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CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

APRIL 1, 1940, TO OCTOBER 6, 1940

WITH

ABSTRACT OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

REPORTED BY
JAMES A. HOYT

VOLUME XCI

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1940

For sale by the Superintendent of Documents, Washington, D. C., Price, $1.50 (Buckram)

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ORDER OF THE COURT RECALLING JUDGE WILLIAM R. GREEN, RETIRED

June 3, 1940.

The Court regrets to announce the retirement, effective May 29th, 1940, of Judge William R. Green.

Suitable recognition of Judge Green's distinguished service on this bench will be entered upon the records of the Court.

The Clerk will read the order of the Court recalling Judge Green for service, under the statute, for the present term of the Court.

In the Court of Claims of the United States

ORDER

RECALLING JUDGE WILLIAM R. GREEN, RETIRED, FOR ACTIVE SERVICE ON THE COURT OF CLAIMS

The Chief Justice having decided that it is necessary to recall Judge William R. Green, retired, to serve with the Court, and Judge William R. Green having assented,

It is hereby ordered this twenty-ninth day of May 1940 that Judge William R. Green be, and is hereby, made an active member of the Court, to sit, hear, and determine all questions which may arise in cases heard by him during the June and October terms of the Court.

By the Court:

Richard S. Whaley, *Chief Justice.*

ORDER OF THE COURT RELATING TO THE DEATH OF JUDGE THOMAS S. WILLIAMS

MAY 6, 1940.

It is with deep regret that the Court records the death, on April 5, 1940, of Judge Thomas S. Williams.

Judge Williams had been in ill health for more than a year but had continued his work with courage and fidelity until within a short time of his death.

Thomas S. Williams was born February 14, 1872, in Blair Township, Clay County, Illinois, the son of William Williams and Nancy Jane (Freeman) Williams, pioneer citizens of Clay County. He was educated at Austin College, Effingham, Illinois. On June 9, 1897, he was married to Mabel Simpson, of Charleston, Illinois, who survives him, with three children, Harold S. Williams, a practicing attorney of Taylorville, Illinois; and two daughters, Mrs. Ruth Hansen, of New Orleans, La., and Mrs. Alice Browne, of Falls Church, Va.

Admitted to the bar in 1896, he began the practice of law at Louisville, Illinois, and continued his practice until appointed to the bench. When a young man he served as city attorney and Mayor of Louisville, later as a member of the Illinois Legislature, and for two terms as State's Attorney of Clay County. He was first elected to Congress in 1914 from the 24th Illinois District and served continuously until November 11, 1929, when he was appointed by President Hoover to the United States Court of Claims. He had been reelected to Congress at the time of his appointment.

A lifelong Republican, Judge Williams had become one of the outstanding leaders of his party at the time of his appointment to the Court in 1929. He was the Chairman of the Illinois Delegation, the Illinois representative on the Committee on Committees of the House, third ranking member of the Committee on Agriculture, and a member of the all-powerful Rules Committee. When a vacancy occurred on the Court of Claims in the fall of 1929, President Hoover nominated Judge Williams for the place. He was unanimously confirmed by the Senate.

As a Judge of this Court his decisions were always distinguished for the clarity with which he stated his opinions and the broad knowledge of the law which they displayed.

LEGISLATION RELATING TO THE COURT OF CLAIMS

[Public—No. 700—76th Congress]

[Chapter 501—3d Session]

[H. R. 10058]

AN ACT TO AMEND THE ACT RELATING TO PREVENTING THE PUBLICATION OF INVENTIONS IN THE NATIONAL INTEREST, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved October 6, 1917 (40 Stat. 394, ch. 95, U. S. C., title 35, sec. 42), be amended to read as follows:

"Whenever the publication or disclosure of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense he may order that the invention be kept secret and withhold the grant of a patent for such period or periods as in his opinion the national interest requires: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner that in violation of said order said invention has been published or disclosed or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents.

"When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government: *Provided*, That the Secretary of War or the Secretary of the Navy or the chief officer of any established defense agency of the United States, as the case may be, is authorized to enter into an agreement with the said applicant in full settlement and compromise for the damage accruing to him by reason of the order of secrecy, and for the use of the invention by the Government."

SEC. 2. This Act shall take effect on approval and shall remain in force for a period of two years from such date.

Approved, July 1, 1940.

[Private Resolution—No. 6—76th Congress]
[Chapter 584—3d Session]
[S. J. Res. 133]

JOINT RESOLUTION TO CONFER JURISDICTION ON THE COURT OF CLAIMS OR THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA TO HEAR, DETERMINE, AND RENDER JUDGMENT UPON THE CLAIM OF MRS. J. W. MARKS, OF STEPHENS COUNTY, GEORGIA

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims or the District Court of the United States for the Northern District of Georgia to hear, determine, and render judgment upon the claim of Mrs. J. W. Marks to the property referred to and described in a deed by Melzinia Scott to Mrs. J. W. Marks dated June 24, 1925, and recorded in office of clerk, Superior Court of Stephens County, Georgia, June 24, 1925, in deed book numbered 16, page 28, and to hear, determine, and render judgment, if any, on any claim for damages that she may be found to have arising by virtue of the Government of the United States or any of its agents entering upon said property, taking possession thereof or in any way trespassing thereon, and award sufficient relief in the premises as under law and evidence may be shown. Such claim may be instituted at any time within two years after the passage of this joint resolution, notwithstanding the lapse of time, or any statute of limitations.

SEC. 2. Proceeding in any suit before the Court of Claims or in the District Court of the United States for the Northern District of Georgia under this joint resolution and appeals therefrom, and payment of any judgment thereon, shall be had as in any other case of which the Court of Claims or the District Court of the United States for the Northern District of Georgia might have jurisdiction.

Approved, July 11, 1940.

[Private—No. 549—76th Congress]
[Chapter 709—3d Session]
[S. 927]

AN ACT TO CONFER JURISDICTION ON THE COURT OF CLAIMS TO HEAR, DETERMINE, AND RENDER JUDGMENT UPON THE CLAIM OF SUNCREST ORCHARDS, INCORPORATED

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon the claim of Suncrest Orchards, Incorporated, against the United States for damages for the alleged wrongful seizure of certain fruit shipped in interstate commerce during the year 1926.

SEC. 2. Such claim may be instituted at any time within two years after the passage of this Act, notwithstanding the lapse of time or any statute of limitations. Proceedings in any suit before the Court of Claims under this Act, and appeals therefrom, and payment of any judgment thereon, shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code as amended.

Approved, September 4, 1940.

[Private—No. 556—76th Congress]
[Chapter 731—3d Session]
[H. R. 4031]

AN ACT TO CONFER JURISDICTION ON THE COURT OF CLAIMS TO HEAR, DETERMINE, AND RENDER JUDGMENT UPON THE CLAIM OR CLAIMS OF THE RECORDING AND COMPUTING MACHINES COMPANY, OF DAYTON, OHIO

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claim or claims of the Recording and Computing Machines Company, of Dayton, Ohio, arising out of a series of transactions, contracts, and provisional adjustments between said Recording and Computing Machines Company, of Dayton, Ohio, and the War Department for the manufacture of ordnance materials, equipment, instruments, and so forth, between the years 1916 and 1920, inclusive, and suit on such claims shall be instituted within one year from the date of approval of this Act.

Approved, September 24, 1940.

[PRIVATE—NO. 631—76TH CONGRESS]
[CHAPTER 873—3D SESSION]
[H. R. 5937]

AN ACT TO CONFER JURISDICTION ON THE COURT OF CLAIMS TO HEAR AND DETERMINE THE CLAIM OF LAMBORN AND COMPANY

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims of the United States be, and hereby is, given jurisdiction to hear and determine the claim, together with interest thereon, of Lamborn and Company against the United States for alleged loss and damage suffered by the said Lamborn and Company, and which arises out of certain transactions involving the purchase of two thousand tons of sugar in the Republic of Argentina on and between May 25, 1920, and June 15, 1920, and the importation of

the said sugar into the United States, pursuant to the representations and requests of the Department of Justice of the United States; and to enter such decree or judgment against the United States for such loss and damage as equity and justice shall require.

SEC. 2. In the proceedings upon such claim before the Court of Claims, the United States shall not avail itself of the defense that the Department of Justice of the United States acted without legal authority in making representations or requests or issuing directions or fixing restrictions with regard to the purchase, importation, or disposition of such sugar.

SEC. 3. Suit upon such claim may be instituted at any time within six months after the date of enactment of this Act, notwithstanding the lapse of time, laches, or any statute of limitations. Proceedings for the determination of such claim and appeals from, and payment of, any judgment thereon shall be in the same manner as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended.

Approved, October 14, 1940.

PROCEDURE WITH REGARD TO PETITIONS FOR REVIEW ON CERTIORARI

[Public—No. 81—76th Congress]
[Chapter 140—1st Session]
[S. 198]

AN ACT TO PROVIDE THAT RECORDS CERTIFIED BY THE COURT OF CLAIMS TO THE SUPREME COURT, IN RESPONSE TO WRITS OF CERTIORARI, MAY INCLUDE MATERIAL PORTIONS OF THE EVIDENCE, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, subsection b, of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, title 28, sec. 288b), be amended so as to read as follows:

"(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Approved, May 22, 1939.

(53 Stat. 752.)

AMENDMENT OF RULES OF THE SUPREME COURT

ORDER OF MARCH 25, 1940

It is ordered that Rule 41 of the Rules of this Court be, and the same is hereby, amended to read as follows:

"41

"JUDGMENTS OF THE COURT OF CLAIMS—PETITIONS FOR REVIEW ON CERTIORARI

"(See Sec. 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939)

"1. A petition to this court for a writ of certiorari to review a judgment of the Court of Claims shall be accompanied by a certified transcript of the record in that court, consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the court, and such other parts of the record as are material to the errors assigned. The petition shall contain a summary and short statement of the matter involved; the relevant parts of statutes involved (see Rule 27 (f)); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) The petition, brief, and record shall be filed with the clerk, and forty copies shall be printed under his supervision. The record shall be printed in the same way and upon the same terms that records on appeal are required to be printed. The estimated costs of printing shall be paid within five days after the estimate is furnished by the clerk; and if payment is not so made, the petition may be summarily dismissed. When the petition, brief, and record are printed, the petitioner shall forthwith serve copies thereof on the respondent, or his counsel of record, and shall file with the clerk due proof thereof.

"2. Within twenty days after the petition, brief, and record are served (unless enlarged by the court, or a justice thereof when the court is not in session), the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs, and record shall be distributed by the clerk to the court for its consideration. (See Rule 38, par. 4 (a).)

"The provision of subdivision (a) of paragraph 3 of Rule 38 shall apply to briefs in opposition to petitions for writs of certiorari to review judgments of the Court of Claims.

"3. The same general considerations will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims as are applied to applications for such writs to other courts. (See par. 5 of Rule 38.)"

It is further ordered that the regulations prescribed by this Court in reference to appeals from the Court of Claims, appearing in 210 U. S., appendix, be, and they hereby are, rescinded.

AMENDMENT OF RULES OF THE COURT OF CLAIMS

It is ordered this 10th day of April 1940 that the Rules of the Court of Claims be, and they are hereby, amended by renumbering the present RULE 99 as 99 (*a*) and by adding to said rule an additional paragraph numbered 99 (*b*) and reading as follows:

"99 (*b*). Whenever a certified transcript of the record is requested by the plaintiff or his attorney of record, or by the Assistant Attorney General, for the purpose of filing a petition for a writ of certiorari in the Supreme Court, and the plaintiff or defendant desires not only the pleadings, findings of fact, conclusion of law, judgment and opinion of the Court but also "other parts of the record as are material to the errors assigned," the party making the request for the record shall file with the Court, not more than forty-five (45) days after judgment has been entered, a copy of the petition for the writ of certiorari and an original and five (5) copies of such parts of the record as, in his judgment, are material to the errors assigned, and serve upon the opposing counsel a copy of the same at the same time it is filed in the Court.

"Unless the parties can agree as to the parts of the evidence in the record which are material to the errors assigned, then counsel for the party so objecting shall, within ten (10) days from the date of the filing in the Court and service upon him of the above record, file with the Clerk of the Court an original and five (5) copies of such parts of the evidence as he considers should become part of the record to be certified, and at the same time serve upon the appellant's attorney a copy thereof. The Court will then settle the record to be certified.

"See Rule 41 of the Supreme Court as amended March 25, 1940, and Supreme Court General Equity Rules."

CASES DECIDED

IN

THE COURT OF CLAIMS

April 1, 1940 to October 6, 1940.

DEWEY SCHMOLL, SUCCESSOR ASSIGNEE FOR THE BENEFIT OF CREDITORS OF MURCH BROTHERS CONSTRUCTION COMPANY, INC., v. THE UNITED STATES

[No. 42519-B. Decided January 8, 1940. Defendant's motion for new trial overruled June 3, 1940]

On the Proofs

Government contract; delay caused by failure to acquire title.—Where the execution of the contract implied an agreement by the Government to acquire title to the premises, or at least control of the premises upon which the buildings were to be erected, it is held that failure to do so, causing a delay in starting the work, operated as a waiver of the time limit of the contract.

Same; violation of contract by separate notices to commence work.—Where the contract implied that one notice to proceed with the work and only one would be given, and when by reason of its own fault and negligence defendant attempted to segregate the work to be done under the contract and to serve notices differing as to the date of completion, it is held defendant again violated the contract.

Same; postponement not a suspension.—Where the contract provided for the suspension of the work under certain circumstances, such provision for suspension cannot be applied to a direction to postpone the commencement of the work.

Same.—To "suspend" work means to stop work already begun.

Same.—The defendant, it is held, could not postpone the commencement of work so as to make impracticable the performance of the contract within the time specified therein and then insist on liquidated damages because the contract had not been performed as originally stipulated.

Same; time for completion.—Where a provision of the contract provides for an apportionment of liquidated damages when part of the buildings are completed within the time specified and part are not so completed, it is held that such provision has application only where a specified time for completion of the buildings remains a valid part of the contract; such provision cannot apply unless it is first found and held that the defendant is entitled to liquidated damages.

Same; breach by failure to provide site.—Failure on the part of the defendant to make available to the contractor the site on which work is to be performed is a breach of the contract. *McCloskey* v. *United States*, 66 C. Cls. 105, cited.

Same; breach by failure to facilitate work.—Where the performance of the contract is required at a fixed date there is an implied contract that the Government will do its part so as to render the performance of the contract possible on the part of the contractor. *Worthington Pump & Machinery Corp.* v. *United States*, 66 C. Cls., 230, cited.

Same; contractor prevented from timely completion.—Where a contractor is prevented from executing his contract according to its terms, he is relieved from the obligations of the contract as to time of completion and from paying liquidated damages. *Levering & Garrigues* v. *United States*, 73 C. Cls. 566, 578 cited.

Same; penalties.—Penalties are not favored by the courts when it does not appear that any actual damages have been sustained.

Same; additional overhead.—Where neither the contractor nor the defendant was the sole cause of delays, and where the delays for the greater part were caused by additional work required by the defendant, which the contractor in part performed at an agreed price, it is held that the contractor is not entitled to recover for additional overhead as such.

Same; special tests.—Where contract provided that contractor should without additional charge furnish all facilities, labor and material for tests required by the inspectors and that special full-size, and performance tests should be as described in the specifications, it is held that contractor is entitled to recover for a special and performance test not described in the specifications.

Same; authority of contracting officer.—Where contractor was allowed additional pay for extra work, on the basis of contractor's actual cost plus 10 percent to cover overhead and profit, and where the extra work was actually performed by a subcontractor, it is held that under the contract the ruling of the contracting officer that the amount allowed (10 percent) for both profit and overhead was sufficient was conclusive.

Same.—Under the contract, the contracting officer's decision was final in disputes as to questions of fact but he was given no authority to determine the proper construction of the contract.

Same; extra work.—Where an independent subcontractor threw out rock and soil, which defendant required the prime contractor to remove and do the necessary regrading in accordance with the specifications, it is held that the plaintiff is entitled to recover for extra work.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff. *Mr. Bernard J. Gallagher* was on the briefs.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Murch Brothers Construction Company, Inc., is a corporation organized under the laws of the State of Missouri, with its principal office in St. Louis, Missouri. Its original petition herein was filed on September 30, 1933, and is docketed as No. 42519. This petition was based on two distinct contracts, one with the United States War Department and one with the United States Veterans' Bureau. On December 17, 1935, the court ordered plaintiff to separately state its two causes of action. Thereafter the two causes of action were docketed as Nos. 42519-A [decided April 4, 1938, 86 C. Cls. 632] and 42519-B, the case at bar.

On January 3, 1936, pursuant to Chapter 36, Revised Statutes of Missouri for 1929, plaintiff assigned all its property to John Schmoll, as trustee, for the benefit of its creditors. On July 31, 1936, this court substituted John Schmoll, as such trustee, for the original plaintiff herein. On September 25, 1936, John Schmoll, as such assignee, filed his petition herein, No. 42519-B. His petition is based on the contract with the United States Veterans' Bureau.

2. On June 13, 1929, the United States, represented by L. H. Tripp, Chief, Construction Division, United States Veterans' Bureau, as contracting officer, and the Murch Brothers Construction Company, as contractor, entered into a contract whereby the contractor, in consideration of the sum of $1,204,000.00 agreed to furnish all labor and materials and perform all work required for the construction and completion, at United States Veterans' Hospital, Somerset, New Jersey, of one Main Building No. 1; one Dining Hall No. 3; one Continued Treatment Building No. 4; one Attendants' Quarters No. 10; one Boiler House No. 14; one Nurses' Quarters No. 16; one Gate House and Fence No. 20; Flag Pole No. 21; one Acute Building No. 2; one Recreation Building No. 5 and Connecting Corridors 1-3, 2-3, 3-4, and 4-5, including all sound deadening specified under Sound Deadening Treatment (alternate); also all Roads, Walks, Grading, and Drainage in connection with these buildings; all in accordance with the contract, specifications, and ad-

denda thereto, schedules and drawings, which are of record as plaintiff's exhibit 100 and are by reference made a part hereof.

The contract required work thereunder to commence within ten (10) calendar days after date of receipt of notice to proceed and to be completed within three hundred fifty (350) calendar days thereafter.

3. On June 13, 1929, the contractor was notified of the award to it of the contract. Notice to proceed with all the work "except Attendants' Quarters No. 10," was received on July 12, 1929, which stated that notice to proceed with that building would be made the subject of a later communication. Notice to proceed with "Attendants' Quarters No. 10" was received on September 26, 1929.

On June 22, 1929, the contractor began the preliminary work of laying out the buildings. On June 25, 1929, it started excavating with a steam shovel.

The date for completing all the work, except building No. 10, was June 27, 1930. On account of the delay in giving notice, the date for completing building No. 10 was understood to be September 11, 1930. The extended date for completing all work except building No. 10 was August 27, 1930. The extended date for completing building No. 10 was November 11, 1930. This was in accordance with the findings and recommendation of the contracting officer of defendant to the head of the department, which findings and recommendation were approved by the Director October 4, 1930.

The specifications provided that the contractor should complete the boiler house No. 14, so that it might be available for use at least ninety days prior to the contract date for the completion of the remainder of the work.

All the contract work, except buildings Nos. 1, 5, and 10, was completed and accepted on September 24, 1930. Buildings Nos. 1, 5, and 10 were completed and accepted on September 27, 1930.

4. Extra work over and above that provided for by the contract was required by defendant which made necessary time extensions aggregating sixty-one days and extensions for performance of the work were accordingly granted pur-

suant to the contract. Change order "F," dated November 25, 1929, granted forty-five days' extension of time on account of additional rock excavation. Change order "Q," dated October 3, 1930, supplemented change order "F," and granted thirteen additional days, making a total of fifty-eight days, on account of that item of extra work. Change order "P," dated October 2, 1930, granted three additional days on account of miscellaneous items of extra work.

The contractor was also granted seventy-six additional days within which to complete building No. 10 on account of the deferred notice to start work on that building. The reason for this deferred notice was that the Government had not acquired title to the site for the building.

5. On September 2, 1930, the contractor wrote the defendant's contracting officer requesting that certain buildings be taken over, to relieve it of the assessment of liquidated damages. The letter requested that George H. Murch, contractor's treasurer, be given an opportunity to discuss the contractor's claim of about four hundred days for extension of time to offset the liquidated damages being assessed against it before the preparation of the final voucher. All the claims asserted by the contractor for extensions of time were considered and discussed in conferences between the defendant's contracting officer and representatives of the contractor prior to the preparation of the final voucher and the making of final settlement thereunder.

During the progress of the work, the Veterans' Bureau forwarded the monthly vouchers and also the final voucher to the General Accounting Office for preaudit before payment thereof.

The contracting officer did not forward any item of claim arising under the contract to the Comptroller General for his decision. During the early part of the contract work, the contracting officer did address several letters to the contractor, stating in substance that he was without authority to grant requested extensions of time other than on account of extra work, particularly before the completion of the contract.

However, at the time of final settlement, the contracting officer made a statement of the account, and assessed and

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deducted liquidated damages on account of all delays in completing the contract work. This was done after he had granted extensions of time, and before the matter was forwarded to the Comptroller General for preaudit.

The final voucher is dated October 2, 1930. It is signed by George H. Murch, treasurer, on behalf of the contractor, and approved by Colonel Tripp, the contracting officer, on behalf of the defendant. It shows on its face the facts respecting the assessment and deduction of liquidated damages by the contracting officer, and the additional compensation allowed by him for extra work on change orders made pursuant to the contract. On October 15, 1930, $128,842.20, the full amount approved by the contracting officer for payment under the final voucher, was paid to the contractor. The contractor reserved the right to submit its claim to the General Accounting Office for the remission of such liquidated damages.

On October 4, 1930, the Director of the Veterans' Bureau approved the final settlement on the basis of the recommendations made by the contracting officer. A copy of the final settlement was delivered to George H. Murch, the contractor's representative.

The contracting officer made no findings of fact but did file with the Comptroller General a summary showing the price of the work under the original contract, the changes made, the time of completion of the several buildings, and a statement of the account between the contractor and the defendant. Upon this statement the so-called final settlement and payment of $128,842.20 was made, but an additional payment was subsequently made as shown in the next finding.

6. After final settlement was effected, the contractor, by letters dated October 30, 1930, May 6, 1931, and July 1, 1931, respectively, filed its claim directly with the Comptroller General for the remission of liquidated damages, payment for alleged extra work performed, and additional contract time.

These claims were forwarded to the Veterans' Bureau by the General Accounting Office for administrative examination and report.

On April 29, 1932, the Comptroller General issued a certificate of settlement certifying that there was due the contractor the sum of $3,626.47 on account of "(1) liquidated damages overassessed for four days in making final payment, $740.00; and (2) earth furnished for fill-in purposes, $2,886.47, all under contract No. VB c–498, dated June 13, 1929." The remainder of plaintiff's claim for additional compensation and additional periods of time was denied.

The action of the Comptroller General in authorizing the additional payment of $3,626.47 was based on the recommendations of the contracting officer, made after the payment referred to in Finding 5 had been made as a final settlement.

In the Certificate of Settlement the Comptroller General stated with respect to the refund of $740.00 theretofore assessed and deducted as liquidated damages:

> The contracting officer, however, has found that you were delayed four days on account of the strike;

This related to a claim by the contractor for twenty-seven days' extension of time on account of "sheet metal workers' strike."

7. *Claim for refund of liquidated damages.*—Paragraph G35 of specifications 2935–H, reads:

> LIQUIDATED DAMAGES: The contractor will pay to the Government, by way of liquidated and ascertained damages and not as a penalty, the sum herein specified for each calendar day beyond the date stated in his bid which he may require to complete the contract, to compensate the Government for its delayed possession. If any unit of the work therein contracted for is accepted in advance of the whole, the amount of liquidated damages then operative will be reduced in proportion to the total value of the work contracted for and of that remaining unaccepted. If a separate price has not been stated in the contractor's bid for the work remaining unaccepted, determination of the value thereof will be made from the approved schedule of cost hereinbefore provided under "Payments to Contractors."
>
> The deductions for failure to complete the work included under each item of the bid, in the time stated, will

be at the following rates, all as subject to the provisions of paragraph on "Delays—Damages" in this specification.

Item I. Two Hundred Dollars ($200.00) per calendar day.

Paragraph 9 of the contract provides, in part, that the "findings of fact" made by the contracting officer respecting the causes and extent of delays shall be final and conclusive on the parties, "subject only to appeal, within 30 days, by the contractor to the head of the Department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

The contractor requested a time extension of seventy-six days to apply to the whole contract work on account of the deferred notice to start work on building No. 10. During the progress of the work the contractor requested time extensions in excess of four hundred and twenty days.

All the work was completed and accepted in approximately four hundred forty-two calendar days. The buildings provided for by the contract were finished and completed as stated in Finding 3.

8. At the time of settlement, the contracting officer assessed and deducted from the balance due the contractor the sum of $5,372.57 on account of liquidated damages, namely:

Deduction for twenty-eight days overdue on all works except buildings 1, 5, and 10, at $120.81 per day	$3, 382. 68
Deductions for thirty-one days overdue on buildings 1, 5, at $64.19 per day	1, 989. 89

The sum of $740.00 was thereafter refunded to the contractor as stated in Finding 6, *supra.* The total amount actually deducted on account of liquidated damages was $4,632.57.

9. Practically all of the work was performed through subcontractors of the Murch Brothers Construction Company.

The work of excavating the foundations of the separate units, except building No. 10, was completed late in September 1929. A steam shovel was employed in the work. Rock was encountered in the foundations of buildings Nos. 1 and

14, and a larger steam shovel was used to facilitate its removal. These steam shovels were removed from the site late in September 1929.

Only a small area in the center of building No. 10 was excavated, namely: A space about 40′ x 40′ and 3′ deep. This part of the work was done by hand labor and completed in about three days, shortly after the contractor received notice to start work on that building, namely, September 26, 1929.

The work covered by the contract included, among other things, the construction of nine separate buildings of various dimensions. The working force employed by the contractor did not permit it to proceed with the construction of all separate units at the same time. Work was started on the larger units and carried forward to an advanced stage. Actual construction work on several of the smaller units, including building No. 10, was deferred for several months after work was started on the larger units. The contractor was notified by the defendant to defer work on building No. 10.

The most important units from the standpoint of early completion, were the medical buildings, particularly Buildings Nos. 1, 2, and 4, the Dining Hall No. 3, and the Boiler House No. 14. It was understood that building No. 10 would not be delivered until after the completion of the other buildings. The value of building No. 10 was approximately $90,000, or about 7½ percent of the entire project.

10. The larger units were Main Building No. 1, Acute Building No. 2, Dining Hall No. 3, Continued Treatment Building No. 4, and Recreation Building No. 5. Progress photographs taken in September and October 1929 show that at that time considerable progress had been made in the preliminary construction work on these units. Early in October 1929 the roof slab was in place on building No. 3. At the same time a considerable part of the concrete and framework was in place on buildings Nos. 1, 2, 4, and 5.

The smaller units were the Attendants' Quarters No. 10, Boiler House No. 14, Nurses' Quarters No. 16, and Gate House No. 20. The monthly progress photographs for the period from September 1929 to November 9, 1929, show that little or

no progress was made on these structures beyond that relating to excavating and footings.

The photographs for December 1929 and January 1930 show no substantial progress was made during that period on Building No. 10. A considerable quantity of ice appears in the excavated area in the center of building No. 10 in the progress photograph dated January 6, 1930. The photographs for March 1930 show the form work for the foundations of this building and also the second floor slabs in place. In April 1930 the steel and concrete framework of this building was in place.

The photographs for December 1929 show the steel frame of building No. 14 in place. Little progress appears in this building until sometime during March 1930. The photographs dated April 1, 1930, show that brickwork on this building was started and the boilers for certain parts of the machinery are shown to have been in place. The roof is not in place and only a small part of the walls are enclosed.

The photographs for December 1929 show the form work for the foundation of building No. 16 in place. The photographs for February 1930 show that little progress was made on this structure during the period from December 1929 to February 2, 1930. The photographs taken in April 1930 show the steel and concrete framework of this building in place.

The photographs taken in December 1929 show that work on building No. 20 had not progressed beyond that relating to excavation. Photographs taken in March 1930 show that no further progress had been made on this unit. The photographs for April 1930 show that work on the foundation had begun. Form work is shown in place at the ground level.

11. The contractor's progress program contemplated the construction of the smaller buildings first and it had planned to have them inclosed by the winter season so as to avoid the delay and expense due to winter conditions. Thus the contractor would avoid the expense of furnishing temporary heat in winter to keep the cement from freezing and also any delay or losses that might result from that cause.

12. The work performed by the concrete subcontractor totaled $258,000.00, which was about twenty-five percent of the whole contract price. This subcontractor suffered great delay

and losses in the performance of his contract, which he completed with the assistance of his surety. The primary cause of the delay and loss suffered by him was the lack of proper roads in and about the site during the winter of 1929 and 1930, which retarded the delivery of materials necessary to enable him to proceed with his work. The subcontractor considered the Murch Brothers Construction Company entirely responsible for the lack of proper roads, and that its failure to erect structural steel and do other essential work also contributed to the delays in performing his contract work. He was not delayed in any way on account of the deferred notice of the defendant to the prime contractor to begin work on building No. 10, but began work on building No. 10 as soon as it was convenient for him to do so and completed his work thereon promptly.

13. There is no satisfactory evidence to show the main cause of the delay in the work on buildings other than No. 10, but delays were caused in part by the financial difficulties experienced by the concrete subcontractor; lack of sufficient workmen; the difficulty in obtaining certain materials to comply with the contract requirements; the replacement of frozen concrete; the dispute between the prime contractor and the concrete subcontractor respecting the furnishing of temporary heat; and the withdrawal of the prime contractor's superintendent and the substitution of another in his place, effective January 14, 1930, following a protest made by defendant's superintendent.

14. *Claim for $13,528.00 additional overhead expenses for seventy-six days' delay: Building No. 10, at $178.00 per day.*—A period of seventy-six days elapsed between July 12, 1929 (the date on which the contractor received notice to proceed with the work, except on building No. 10), and September 26, 1929, the date it received notice to proceed with building No. 10.

During this period the contractor's forces were continuously engaged in performing work on units other than building No. 10. The contractor did not proceed with the construction of this unit, and also of buildings Nos. 14, 16, and 20, until several months after excavating work on these units

had been completed (Finding 9, *supra*). No mechanical equipment was employed in performing the excavating work on building No. 10.

The contractor repeatedly protested in writing that it had been delayed seventy-six days on the entire project, and requested that such additional time should apply to the whole contract work.

In a letter dated July 1, 1931, addressed to the Comptroller General, in support of the claim filed by it with that official, the contractor stated its "contention that seventy-six (76) days' extension of time is technical only." It further stated: "We are requesting this extension of contract time for the entire project since we understand from a recent ruling of the Comptroller General that it was ruled that contracts that were let as a whole could not be divided and time allowed for one particular building."

Neither the excavating subcontractor nor the concrete subcontractor was delayed by reason of the deferred notice to begin work on building No. 10.

The evidence as to the extent and nature of delays on buildings other than No. 10 is contradictory and unsatisfactory but it is evident that both the contractor and the defendant contributed to hindrances in completing the work: the contractor through delays by its subcontractor for the cement work and by other matters; the defendant by requiring extra work, some of which was not provided for in the contract. Some of the delay was the fault of defendant's own subcontractor, and other matters might be mentioned in this connection. The contractor was delayed and inconvenienced in the work on building No. 10 by not being able to carry on the work at the same time as on the other buildings.

15. *Claim for three days' extension of time: Construction of extra steam pit in building No. 16.*—On February 7, 1930, the contractor submitted to the defendant a written proposal for furnishing labor and material for the construction of a concrete pipe trench, including the pit to be installed in lieu of the open ditch below the first floor slab of Nurses' Building No. 16, for the sum of $2,114.18, and requested a time

extension of seven days. This proposal was rejected as excessive. The contractor was requested to submit a new proposal for the construction of concrete walls and floor for steam pit only. Following conferences and an interchange of correspondence, and new proposals, the contractor on August 22, 1930, offered to do the work for $150.00, plus ten days' extension of time. On October 2, 1930, change order P was issued allowing, among other things, $150.00 for this item of work. This change order granted the contractor three additional days' time, which ran concurrently with other time extensions for additional work covered by the same change order.

16. *Claim for seven days' extension of time: Additional furring—building No. 16.*—On August 12, 1930, the contractor proposed, in writing, to furnish additional labor and material for enclosing pipe work for lavatories in Nurses' Building 16, for the sum of $432.43. It requested a time extension of seventeen days. This proposal was rejected as excessive. On September 27, 1930, the contractor agreed to do this work for $232.80. It requested a time extension of seventeen days.

On October 2, 1930, change order "P" was issued allowing the sum of $232.86 on account of this extra work. Three additional days were granted, which ran concurrently with time extensions applying to other work. This action was taken at the time of final settlement, and after conferences with the contractor.

17. *Claim for four days' extension of time: Sheet-metal workers' strike.*—On April 12, 1930, the defendant's construction superintendent notified the Veterans' Bureau that the contractor had requested an extension of time on account of a strike by the sheet-metal workers. He recommended that no extension of time be granted, stating that he could not see that the contractor had been delayed on that account.

On July 14, 1930, the defendant's superintendent wrote the Bureau that the men were on strike from March 28, 1930, to April 23, 1930; that buildings Nos. 5, 10, and 1 were not in condition for the sheet-metal workers; that progress on buildings Nos. 14, 16, 2, 4, and 20 was not handicapped by

lack of mechanics in this trade; that a strike on any job causes some delay, but in this case the delay was negligible. He recommended that not more than four days' extension of time be granted.

After final settlement was effected, the sum of $740.00 was refunded to the contractor in the certificate of settlement issued by the Comptroller General on April 29, 1932, based on the finding and recommendation of the contracting officer that the contractor was delayed four days on account of this strike. The contractor conceded that it was not delayed more than four days on account of this strike.

18. *Claim for five days' extension of time: Alleged delay caused by independent contractor; pouring basement floor in building No. 14.*—On April 22, 1930, the contractor wrote to the defendant's superintendent at the site that it had been delayed in proceeding with the basement floor of building No. 14 (Boiler House) because of its understanding that the Bureau planned to change the floor drains; that it understood that such change order was issued on April 19, 1930. It requested an extension of sixty days on this account.

This change order related to work performed by an independent contractor, namely, the T. E. Thomas Plumbing & Heating Company.

The defendant's superintendent forwarded the contractor's letter and related correspondence to the Bureau and stated:

> * * * the change in the floor drains was not mentioned to Murch Bros. at any time, and did not in any way hold up the progress of their work. The floors in this particular building could have been laid at any time in the past two months, besides all other work in this building could have progressed much faster than it did.
>
> I can see no reason for an extension of time on the above grounds.

On April 24, 1930, the Bureau replied to this letter, stating that the contractor had given no prior notice of this delay; that the cause cited was found not to be a proper basis for delay in "noncompletion" of the superstructure of the building, and directed that the contractor be advised that its request was disapproved.

On July 14, 1930, the defendant's superintendent wrote the Bureau as follows:

> * * * this office does not believe that additional time should be granted Contractor for the reason that this floor could have been laid months before, and Murch Brothers were not held up nor given orders to hold up for any future change by independent contractors. In fact, it is the opinion of this office, through investigation, that up to the time Thomas started putting in the drains Murch Bros. had no inkling that a change order was contemplated in this building. You will note that their request is dated April 22, 1930, and the change order "O" delivered to contractor, the T. E. Thomas Plumbing & Heating Company, April 18, 1930.

A witness for the plaintiff testified that the contractor could have laid the basement floor of this building several months before the work was actually done.

The change order issued to the mechanical contractor, the T. E. Thomas Plumbing & Heating Company, did not delay the contractor in laying the concrete floor of this building. The mechanical contractor was allowed no extra time on account of this change order.

19. *Claim for five and one-half days' extension of time: Strike of electricians.*—On July 14, 1930, the defendant's superintendent of construction forwarded to the Bureau a letter from the contractor stating that its work on building No. 14 (Boiler House) was being held up on account of a strike of the electricians. The superintendent stated that he had advised the contractor:

> * * * that such claim was unreasonable in that the electricians are not in any way holding up the General Contractor.

He recommended that the request be disapproved.

On July 22, 1930, the contractor wrote the defendant's superintendent that the electricians ceased work on July 2, 1930, and resumed work on July 14, 1930. It requested a time extension of twelve days on this account.

On July 28, 1930, the Bureau wrote the contractor, stating:

> * * * The Superintendent of Construction has reported that the fact mentioned has in no way interfered with or caused delay of work under your contract and

in the absence of specific showing to the contrary on your part, no finding of fact that delay has occurred, as claimed, can be made.

20. *Claim for ten days' extension of time: Jurisdictional dispute of crafts—installation of sound deadening equipment.*—On July 7, 1930, the contractor wrote the defendant's superintendent that on July 1, 1930, it had ceased installation of sound-deadening treatment because of a dispute between the carpenters and plasterers. On August 6, 1930, the contractor wrote the superintendent that on August 5, 1930, it had resumed work and requested a time extension of thirty-five days. On August 27, 1930, the defendant's superintendent wrote the Bureau respecting the facts on which he had based his previous recommendation that no extension of time be granted, and stated:

> The side walls were white coated and the ceilings browned before start of this installation, thereby not interfering with plastering. The laying of floors was in no way delayed. Carpenter work likewise.
>
> In fact, at the time of the strike, there was but three days' work left to entirely clean up the sound deadening work on this contract.

21. *Claim for twenty days' extension of time: Concrete performance tests.*—On November 6, 1929, the defendant's contracting officer notified the contractor that load-bearing tests would be made of certain slabs in place on separate floors of each building. This action was taken following an inspection at the site by the chief of the structural subsection of the Veterans' Bureau who reported that concrete in place "is far from satisfactory," and that he doubted "its sufficiency to meet design requirements."

Following the completion of these tests, the contractor, on February 20, 1930, submitted a proposal to cover the costs of the tests in the sum of $1,077.69. It made no request for an extension of time. On June 10, 1930, the contractor was notified that its claim was disallowed.

On June 18, 1930, the contractor submitted a revised proposal and requested an extension of thirty days' additional time for delays on account of these tests. On July 9, 1930,

the contractor was advised that its claim for additional compensation and thirty days' extension of time was rejected.

The facts concerning this claim are more fully covered in finding 24.

22. *Claim for ten and one-half days' extension of time: Five day week, in lieu of five and one-half day week.*—On April 25, 1930, the contractor addressed a letter to the "Construction Division, U. S. Veterans' Bureau" stating that its contract was made on the basis that existing working conditions would continue to prevail until its completion, and that:

> We have now been notified by the Building Trades Council of New Jersey that on and after May 1, 1930, a five (5) day week will prevail and no work will be allowed on Saturday.

On May 1, 1930, the defendant's contracting officer replied stating:

> The Bureau is without authority to excuse you from completing the construction work at Somerset Hills, N. J., within the time stipulated in the contract. Your statement in this connection has been filed.

23. *Claim for nine days' extension of time: Grading, removing of surplus rock.*—When the work was near completion the contractor filed a written claim with the defendant's superintendent in the sum of $1,349.00, for the removal by it of certain rock allegedly left on the surface of the site adjacent to the buildings, by independent contractors, and also for replacing such rock with top soil. It made no claim for extension of time. The contract required all lawn areas to be covered with at least six inches of top soil after the completion of rough grading. The contracting officer disallowed the claim for additional compensation. This claim for extension of time was first asserted at the hearing on the pleadings in this Court.

The record shows that on March 1, 1930, the contractor wrote the defendant's superintendent stating "We have previously completed our grading at most of these locations, * * *" and independent contractors were leaving the grading in an unfinished state after filling in trenches. The

progress photographs taken several months thereafter show that the grades surrounding the buildings at that time were in an unfinished state.

24. *Claim for $1,077.69: Performance tests concrete.*—Paragraph 10, page 3C–6 of the Specifications, provides that concrete floor slabs shall be of type "B" concrete.

Paragraph 4, page 3C–2 of the Specifications, provides:

> Type "B" (reinforced concrete) shall be composed of one (1) part Portland cement, two (2) parts sand and four (4) of ¼″ to ¾″ broken stone or gravel.

The specifications on the project required the contractor to furnish the Government a sample of the cement, sand, and gravel it proposed to use on the project. This was done and the Government approved the material.

The specifications also required that before the contractor could pour any concrete it must get the approval of the superintendent of construction, which in all cases was done. Likewise the superintendent of construction was to see that all concrete was inspected before it was poured and to inspect the form work and see that it was satisfactory. This was done on all concrete poured.

Up to November 2, 1929, when two-thirds of the concrete on this project had been mixed and poured under the continuous inspection and control of the Government inspector, no complaint had been made by the Government or any Government official as to the quantity or quality of the materials the contractor was using or to its workmanship. On November 6, 1929, the contractor received a written order from the Veterans' Administration requiring it to make a load bearing or performance test on the concrete in place under instructions received from the Bureau's superintendent of construction. Thereafter, and under date of November 8, 1929, defendant's contracting officer furnished such instructions to its superintendent of construction detailing the method of testing and performing the tests and in the latter part of November the contractor advised the defendant it would make this test and bill the Government for the cost. These tests were conducted by the contractor under instructions from the defend-

ant and the supervision of its officers. The contractor performed these tests under protest and kept an accurate record of the cost of the work, billing defendant for the same. Defendant concedes the charge of $1,077.69 for this work is reasonable in event it should be held liable.

The result of the tests performed upon defendant's instructions showed that the beams would carry twice the live load for which they were intended and the concrete work was thereupon accepted by defendant as satisfactory. The contractor's claim for payment of the cost of the tests, however, was disallowed.

25. *Claim for $10,324.00 overhead on account of rock excavation.*—Paragraphs 2 and 3 of the specifications, pages 1C-1 and 1C-2 (Earth Work) provide:

> 2. EXCAVATION: * * * All excavating will be based on earth, but should rock be encountered it will be paid for as an extra in accordance with the contract. * * *
>
> 3. ROCK EXCAVATION: Should rock be encountered within the limits of the required excavations, payment for removal of same will be made subject to such adjustment as is provided by Articles 3 and 4 of the contract. * * *

A quantity of shale rock was encountered in excavating the foundations of buildings 1, 3, 4, and 14. The contractor submitted several proposals for the removal of this rock on the basis of actual cost, plus 10 percent profit and 10 percent overhead.

All of the rock was removed by the subcontractor, the International Excavating Company Inc., which managed and directed the work of removal. On September 12, 1929, the contractor submitted a proposal for rock excavation in the sum of $31,227.44, and requested a time extension of thirty days. On October 12, 1929, the contractor submitted a revised proposal in the sum of $26,717.53, and requested a time extension of thirty days.

On October 28, 1929, the defendant's contracting officer wrote the contractor that its proposal of October 12 for extra rock excavation had been examined; that the quotations sub-

mitted did not indicate whether the prices were net or subject to reduction on account of a corresponding reduction in earth excavation; that it was not the practice of the Bureau to allow 10 percent profit and 10 percent overhead, except in cases where the work incident to changes was performed by hired laborers of the contractor, and that in such cases the necessity for laying off or rearranging labor schedule, for ordering new material and for rearrangement of the work, and readjustment to the work of various trades is involved, and justifies such a procedure; that—

> In the instant case where a large part of the burden of the change except for the delay caused thereby is assumed by your subcontractor and where your overhead in connection with same should be relatively small, the addition of 10 percent of the actual cost to cover your overhead and profit is considered ample and equitable.

He stated that an additional thirty days' time was considered reasonable.

On November 4, 1929, the contractor submitted a revised proposal in the sum of $21,756.73, and requested a time extension of sixty days.

On November 25, 1929, the contracting officer advised the contractor of a change order covering rock excavation in the sum of $19,778.86 and granting a time extension of forty-five days on account of rock excavation. This change order was based upon the contractor's actual cost, plus an additional ten percent to cover overhead and profit. On October 3, 1930, a further change order was made increasing the time for the performance of rock excavation by thirteen days, making a total allowance of fifty-eight days' additional time for the extra work involved in the operation. No change was made in the amount allowed on the work for overhead and profit involved. The allowance for both was ten percent. The average overhead during the time the contractor was engaged on the contract was $178 a day.

26. *Claim for $1,349.00 removal of surplus rock and regrading.*—Article 1 of the contract required the contractor to furnish all labor and material for "finishing complete * * * grading," etc., under the contract.

Paragraph 31, page 34C-1, of the specifications, provided:

> 3. GRADING: * * * After rough grading is completed and has had time for settlement, all lawn areas shall be covered with at least six inches of top soil and hand raked to a fine, smooth surface for seeding.

The record establishes that the "entire excavation, including rough grading," was completed on October 16, 1929.

After the contractor had finished the grading and put in the topsoil required by the contract, an independent contractor or contractors in excavating trenches for carrying certain pipes connecting the various units dumped a quantity of rock over the soil which the plaintiff contractor had prepared as stated above. The defendant's construction engineer required the contractor to remove the rock and refinish the lawn areas in accordance with the requirements of the contract. The contractor's engineer measured the soil involved and found the amount was 2,076 cubic yards. The contractor requested payment therefor at 65 cents a cubic yard, or a total of $1,349.40. The defendant made no objection to the price a yard but disputed the quantity worked over by the contractor and denied all liability for this item, insisting that the independent subcontractor was liable for the damage, if any.

27. *Claim for $1,643.54: Metal ducts.*—Paragraph 19, page 21C-6, of the specifications provides:

> VENT DUCTS: Provide all sheet metal ducts shown or required which are not elsewhere specified to be included under other contracts, but including ducts where so indicated in attics from top of vertical ducts at attic floor level and connect to roof ventilators as indicated. * * *
>
> Item 145 of addendum No. 1 provided: Page 1, H-17, Article 32. VENT DUCT AND GALVANIZED IRON WORK. Omit the entire article and substitute the following:
>
> 32. VENT DUCT AND GALVANIZED IRON WORK: Furnish and install all necessary galvanized iron work, including ducts from diet kitchens to exhaust fans in Main Building No. 1, and from terra cotta vent ducts furnished by others in Acute Building No. 2, including all metal work around exhaust fans and discharge from fans to atmosphere as indicated on the drawings.

Under this provision the defendant's superintendent ruled that with the exception of galvanized ducts to be connected with the exhaust fan system, all metal ducts were to be furnished by the contractor; that there were two independent systems of galvanized vent ducts, one connected with the roof ventilators and the other with the exhaust fans; that the system connected with the exhaust fans was shown on the heating drawing and was to be installed by the Thomas Company, but that the system connected with the ventilators was shown on the architectural drawings and that the different ducts shown and numbered on that drawing and all iron work connected with that system were included under the contract and should be installed by the contractor. This claim is for the installation of the ducts connected with the ventilators which the contractor was required by defendant to furnish. If the contractor was not required by the contract to install the ducts in controversy, defendant concedes the amount of the claim. The work provided for by Article 32 was let by defendant to the Thomas Plumbing & Heating Company, an independent contractor, and the parties agree that the ducts required were to be made of galvanized iron.

28. *Claim for $2,555.52: Copper flashing for cornices of gable roof.*—Paragraph 12, page 21C-3 and 21C-4 of the specifications provides:

> 12. FLASHINGS, ETC.: Flashings shall be laid in the best manner and left perfectly watertight for all roofs, projections, surfaces, etc., where flashing is shown or required to make a watertight job. All sloping roofs shall be flashed and counterflashed against all breaks and projections, and about pipes, etc., passing through roofs. All copper for flashing shall be 16 oz. * * *
>
> Metal covering of all projecting cornices, pediments over doors, etc., column and pilaster caps, coping, etc., base blocks for wood posts and similar places; also all metal roofing, flashings, etc., at tower and cupola of Main Building shall be of copper.

The defendant required the terra-cotta gables to be covered with copper flashing, which was done by the subcontractor. The defendant admits that if plaintiff is entitled to recover on this item, the amount claimed by plaintiff is reasonable.

29. Article 15 of the contract provided as follows:

> ART. 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, on January 8, 1940, delivered the opinion of the court:

This is a suit on a contract made with the defendant by Murch Brothers Construction Company, Inc., and performed by that company and its subcontractors. It was originally brought by the contractor. Thereafter, for reasons not necessary to be set out here, by leave of court the present plaintiff was substituted as trustee and has succeeded to all the rights of the contracting company.

The plaintiff seeks to recover the sum of $4,632.57, representing liquidated damages assessed and deducted by the contracting officer at the time of final settlement, and also the additional sum of $30,478.15 on account of damages and extra costs alleged to have been incurred in the performance of the contract, making a total of $35,110.72, for which he asks judgment.

On June 13, 1929, the Murch Brothers Construction Company, Inc., made a contract with the United States Veterans' Bureau for the construction of nine separate buildings with connecting corridors, together with certain roads, walks, and grading, at the United States Veterans' Hospital at Somerset Hills, New Jersey.

The contract required the work to commence within 10 calendar days after receipt of notice to proceed and to be completed within 350 calendar days thereafter. It further provided for the payment of liquidated damages of $200 a day for each calendar day beyond the date *stated in the bid* which the contractor might require to complete the contract. The terms

of the contract with respect to this matter are set out in Finding 7.

The contract was awarded to Murch Brothers Construction Company, and notice to proceed with all the work except building No. 10 was received on July 12, 1929. Notice to proceed with "attendants' quarters No. 10" was received on September 26, 1929, which was 76 days subsequent to the first notice to proceed with all the other buildings. Nothing was stated in this last notice as to when the building should be completed. The delay in giving this notice was due to the failure of the defendant to obtain good title to the site on which building No. 10 was required to be constructed.

All the contract work, except buildings Nos. 1, 5, and 10, was completed and accepted on September 24, 1930. Buildings Nos. 1, 5, and 10 were completed and accepted on September 27, 1930.

The matters at issue in the case will be taken up in the order that they are submitted in argument.

As above stated, in making the final payment to the plaintiff, defendant deducted $4,632.57 as liquidated damages for failure to complete the work within the time required by the contract. Plaintiff insists that no liquidated damages could properly be assessed and seeks to recover the amount so deducted.

The provision of the contract with reference to liquidated damages is set out in Finding 7. It provided for the payment of $200 for each day beyond the date stated in the bid which the contractor might require to complete the contract. The record does not show the date stated in the contractor's bid, but counsel on both sides assume that the contract in this respect followed the terms of the bid and, as stated above, required work thereunder to commence within 10 calendar days after receipt of notice to proceed and to be completed within 350 calendar days thereafter. The contractor did not complete the work within 350 days from the time it was given a notice to proceed, but plaintiff contends that the provisions of the contract with reference to completion of the work and liquidated damages were entirely abrogated through the acts of the defendant.

It appears from the evidence that by reason of neglect on the part of the defendant to obtain title to the premises on which building No. 10 was to be erected, construction work on that building had to be postponed. Consequently defendant did not serve a notice to proceed, as was clearly contemplated by the contract, but gave notice to proceed with the work except on building No. 10, and 76 days later gave notice to proceed with the work on the building last named. Later the defendant found it necessary to extend the time on all the buildings 61 days, which had the effect of granting a further extension on building No. 10 for that time beyond the 76 days already granted.

It was the duty of the defendant to acquire title, or at least control of the premises upon which the buildings were to be erected, prior to giving notice to the contractor to proceed with the work. The execution of the contract implied an agreement to that effect and the failure of the defendant in this respect operated as a waiver of the time limit of the contract. Moreover, the contract implied that one notice to proceed with the work and only one would be given, and when by reason of its own fault and negligence defendant attempted to segregate the work to be done under the contract and serve notices differing as to the date of completion it again violated the contract. It is argued on behalf of defendant that the contract provided for a suspension of the work under certain circumstances and that there was authority for its act in this provision. There is no foundation for this argument either in the dictionary definitions or in common knowledge as to how these words would be understood and this defense is unavailing. To "suspend" work means to stop work already begun. It cannot apply to a direction to postpone the commencement of work. Moreover, we are not here discussing whether defendant had the right to postpone the work, which in itself and alone is immaterial as the contractor went on with the work in accordance with the directions of the defendant. The question here is whether defendant could postpone the commencement of work so as to make impracticable the performance of the contract within the time specified therein and then insist

on liquidated damages because the contract had not been performed as originally stipulated.

It is also argued on behalf of defendant that the contract is divisible and, admitting that its claim for liquidated damages could not apply to building No. 10, it is said there was still a default on the part of the contractor in not completing the other buildings within the extended time granted and that liquidated damages should follow even though the contractor made no new agreement with reference to the completion of the other buildings. In support of this contention, counsel quote a provision of the contract with reference to an apportionment of liquidated damages when part of the buildings are completed within the time specified by the contract and part are not. But this has application only where a specified time for completion of the buildings still remains a part of the contract, or, in other words, this provision can not apply unless it is first found and held that the defendant is entitled to liquidated damages.

The argument of counsel for the Government is in effect that regardless of the contract the defendant could fix any date which seemed necessary or desirable for the commencement of the work as to one or more buildings, to be completed in 350 days thereafter, and recover liquidated damages if the other buildings were not completed within 350 days from the time when notice to proceed was given with reference thereto. We do not think this can be the law. Certainly it cannot where the fault or negligence of the party claiming liquidated damages is the cause of the delay and the violation of the contract.

We have seen that the defendant negligently failed to make the site for building No. 10 available until 76 days after notice to proceed on the other buildings was given and that it required extra work to be done in connection with the buildings by reason of which it was obliged to grant still further time for their completion. We think (although it is not necessary to so hold in order to deny an award of liquidated damages) that in cases where the party claiming liquidated damages has found it necessary to change the time of completion on account of work not provided for in the contract being

required and no new agreement is made, we cannot presume that the contractor agreed to be liable if the work was not completed within the extended time, but, on the contrary, the presumption would be merely that the contractor was to complete the work within a reasonable time and nothing further; in other words, the provisions with reference to liquidated damages would not apply. In any event we think the contract for liquidated damages was eliminated as the failure to make available the site for building No. 10 delayed the completion of the project to the very last. It is said that the delay on this building did not damage the contractor. If this be a fact it is immaterial, for the contractor had the right to this provision whether or not it eventually turned out to its benefit. Plaintiff says it is not a fact. An officer of the contractor testifies that he was delayed and inconvenienced by not being able to work on building No. 10 at the same time as on the others and his testimony is so reasonable we accept it as correct. Plaintiff contracted to finish the buildings at a certain time, but even counsel for defendant do not now contend that that agreement remained in force; and, as we have stated above, no agreement was made providing that if the buildings were not finished by a different time the defendant was entitled to liquidated damages. It should be noted in this connection also that the findings recite that extra work over and above that provided for by the contract was required by defendant which made necessary time extensions aggregating 61 days, and extensions for performance of the contract were accordingly granted. In the case of building No. 10 the notice to proceed was 76 days late because the defendant had negligently failed to acquire title to the premises so the contractor could proceed. Later a further extension was granted. The effect of these acts by the defendant is shown by numerous authorities. In *McCloskey* v. *United States*, 66 C. Cls. 105, we held that the failure on the part of the defendant to make available to the contractor the site on which work was to be performed was a breach of the contract. In *Worthington Pump & Machinery Corp.* v. *United States*, 66 C. Cls. 230, 240, it was held that where the performance of the contract was required at a fixed date there was an implied contract that the Government would do its part so as to render the per-

formance of the contract possible on the part of the contractor. In *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 566, 578, this court stated that "where a contractor is prevented from executing his contract according to its terms, he is relieved from the obligations of the contract [as to time of completion] and from paying liquidated damages." In several cases we have held that where delays are caused by both parties to the contract the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled.

The contract was not completed until all the buildings were finished. The defendant caused delay in its completion not only by its acts with reference to building No. 10 but by requiring extra work over and above that provided for in the contract and part of this, as we shall see further on, was caused by permitting one of its own contractors to impede the work of the prime contractor. Penalties are not favored by the courts when, as in the case before us, it does not appear that any actual damages have been sustained. They are "enforced only after the demandant therefor has shown that he himself has strictly complied on his part with all the contract requirements prerequisite to such enforcement." *Jefferson Hotel Co.* v. *Brumbaugh*, 168 Fed. 867, 874. In *United States* v. *United Engineering Co.*, 234 U. S. 236, 242, it was held that—

> * * * when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages * * * for each day's delay, * * * the other party must not prevent the performance of the contract within the stipulated time,

and in such a case, though the completion of the work is delayed by the fault of the contractor, liquidated damages are waived.

The argument on behalf of defendant mentions "findings of fact" as having been made by the contracting officer, and the contract provides that such findings, if made, respecting the causes and extent of delays "shall be final and conclusive on the parties hereto, subject only to appeal, within 30

days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto." The evidence fails to show that the contracting officer executed what might properly be called "findings of fact" and we think if he had done so it would be immaterial in considering the matter of liquidated damages for which, under our holding stated above, the plaintiff is not liable.

In support of the argument for defendant, counsel cite the case of *Robinson, Administrator*, v. *United States*, 57 C. Cls. 7, but in that case the contract was altogether different from the one before us, in that it provided that one day should be added to the contractor's time for completion for each day's delay caused by the Government. Consequently, the date for completion was fixed and extended to a certain date by the contract. The court therefore held that damages must be computed from that date as if it had been so stated in the contract. The case last cited above, in our opinion, has no application.

The plaintiff on his part, as successor to the contractor, claims damages for overhead expenses for 76 days' delay in the work caused, as he contends, by reason of the fact that the construction of building No. 10 was delayed for that length of time, and asks that damages be allowed in the sum of $178 a day for this period, or a total of $13,528. We are quite clear that the plaintiff is not entitled to all of this sum. Neither the contractor nor the defendant was the sole cause of the delays. The evidence shows that while the extension of time granted for the completion of building No. 10 delayed the completion of the project, it did not retard the work on the other buildings. These delays would have occurred in any event regardless of whether or not the work on building No. 10 was postponed. The delays on the other buildings were caused partly by the contractor but for the greater part by additional work required by defendant, which the contractor in part performed at an agreed price and in part is now making a further claim for compensation thereon. Where the work was done at an agreed price this would include the overhead, and if judgment is awarded plaintiff for a greater amount than has been

paid for any extra work it will be for the reasonable value thereof, which would include overhead. Moreover, the evidence fails to show how much delay was caused by the contractor failing to have sufficient workmen, and it may or may not have been considerable. The main point in this connection is that as far as the delay is concerned with reference to buildings other than No. 10, it was not caused by any act of the defendant except in requesting or demanding that extra work be performed and for that work the contractor will be duly allowed in computing the judgment to be rendered herein. The payment for this work, whether agreed upon by the parties or allowed by the court, will presumptively include the amount of overhead caused thereby, if there was any additional overhead. We think it is very definitely shown that no overhead can be allowed on account of the delay with reference to buildings other than No. 10. In this connection it should be noticed that some of the delay was the result of the failure of a subcontractor to complete his part of the work, and the delay of this party is shown by the evidence to have been caused by the contractor. It is not possible to separate and fix the amount in each instance which can be charged respectively to the contractor or the defendant up to September 24, 1930, which is the date when all the buildings except Nos. 1, 5, and 10 were completed. It is obvious that no claim for overhead can be allowed for delays prior to September 24, 1930.

There is another matter which must be taken into consideration in determining whether any overhead can be allowed. The contract provided for change orders and for an extension of time by the contracting officer when made necessary thereby. It also provided that when extra work was required the contractor should be compensated for doing it. In such a case, we do not think that, where an extension is granted on request of the contractor, any claim for additional overhead can properly be made. The contractor, however, on buildings other than No. 10 used more time than was granted by the extensions. We think no overhead can be allowed for this additional time unless the contractor shows it was without fault in using it and the con-

trary appears from the evidence. Building No. 10 was completed within the extended time, but this building and Nos. 1 and 5 were all completed and accepted at the same time and there is no way of separating the overhead on these buildings from that on No. 10. Plaintiff's claim for overhead must fail for want of proof.

Plaintiff claims $1,077.69 for the costs of making performance tests of the concrete which the contractor supplied in carrying out the work required by the contract.

The contract required that the contractor should "furnish promptly, without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors," and also that "Special, full size, and performance tests shall be as described in the specifications." Certain tests were required by defendant for the purpose only of determining whether the concrete could be depended upon to safely carry the design live load. The result of the tests developed that the concrete would carry twice the design load for which it was intended, and it was thereupon accepted as satisfactory. There were no specifications attached to the contract with reference to the live load which the concrete could safely carry. The test required, as we think, was a special and "performance test," and, not being described in the specifications, plaintiff could not be required to perform it without payment. There is no dispute about the cost of making these tests, and plaintiff is entitled to recover $1,077.69 on this item.

A claim is made for $10,324 overhead on account of rock excavation. What has been said above with reference to allowance for overhead is sufficient to dispose of this item; but possibly, as this is the subject of a separate claim, it would be better to add a few words of explanation. This overhead is asked on account of extra work required in the way of rock excavation, all of which was performed not by the prime contractor but by the subcontractor. The contractor was allowed by a change order $19,778.86 for this work. The change order was based upon the contractor's actual cost plus 10 percent to cover overhead and profit. Specicifically, plaintiff's claim is that he was not allowed for

overhead but simply for profit and that there should have been an allowance for both. The work having all been done by a subcontractor it could not have increased the contractor's overhead very much, if at all. The contracting officer ruled that the amount allowed (10 percent) was sufficient to pay for both profit and overhead under the circumstances. This was a question of fact as to which the decision of the contracting officer was conclusive under the contract. Moreover, there is a lack of evidence to show that the amount allowed was not fair and equitable.

Plaintiff claims $1,349 for removal of surplus rock and regrading. An independent subcontractor, in digging the ditches necessary under its contract, threw out rock and soil and left this debris on the surface in such a manner that the provisions of the original contract with reference to grading were not complied with. The defendant required the prime contractor to remove this rock and do the necessary regrading in accordance with the specifications. The evidence shows that this work cost $1,349. The principal defense to this claim is that the liability, if any, was on the part of the subcontractor and not upon the defendant. We think the defendant was liable for the acts of its subcontractor and that plaintiff is entitled to recover the amount claimed.

Another claim is for $1,643.54 for metal ducts. Plaintiff's right to recover turns upon the interpretation of paragraph 19, page 21C-6, of the specifications for general instructions, which reads in part as follows:

> Provide all sheet metal ducts shown or required which are not elsewhere specified to be included under other contracts, * * *.

It appears, however, that the Thomas Plumbing & Heating Company was required to "furnish and install all necessary galvanized-iron work, including ducts from diet kitchens to exhaust fans in Main Building No. 1." The contracting officer ruled in effect that under the contract the Thomas Plumbing & Heating Company was required only to furnish the galvanized-iron work or galvanized ducts to be connected with the exhaust-fan system. This was erroneous. The

ducts in question were to be made of galvanized iron, and the Thomas Company was required to furnish "*all* necessary galvanized iron work". [Italics ours.] The words "including ducts from diet kitchens to exhaust fans in Main Building No. 1" are not an expression of restriction but merely a specification to make more certain. Under the contract, the contracting officer's decision was final in disputes as to questions of fact but he was given no authority to determine the proper construction of the contract.

The defendant contends, on the authority of *Bowe* v. *United States*, 42 Fed. 761, 778, that the plaintiff cannot recover on this item for the reason that the contractor made no protest against the decision of the contracting officer and filed a claim with the Comptroller General. We are clear that the case cited has no application as the decision therein was founded upon a provision in the contract to the effect that no allowance should be made for extras "unless provided for beforehand by written agreement".

The next claim is for $2,555.52, copper flashing for cornices of gable roof. The specifications required that "metal covering of all projecting *cornices* * * * shall be of copper" [italics ours]. The contracting officer held that the *terra cotta gables* were to be covered with copper flashing. This claim turns upon the construction of the words "cornices" and "terra cotta gables" as used in the contract. The words "cornice" and "gable," as defined by the dictionaries, refer to different details of construction, and we think that a "cornice" does not include a "gable." But conceding that the contract was ambiguous in this respect, a reasonable construction should be put upon it. Terra cotta is among the most durable of building materials. There is not the slightest necessity of putting a metal covering over it, and it is a matter of common knowledge that this is seldom, if ever, done, and that to so cover it would generally mar the architectural effect. We are clear that plaintiff is entitled to recover on this claim also.

It follows from what has been said above that the plaintiff is entitled to recover $4,632.57 deducted by defendant as liquidated damages; $1,077.69, cost of tests not required by the contract; $1,349.00 for removing surplus rock; $1,643.54 for

metal ducts; and $2,555.52 for copper flashing furnished in response to defendant's demand but not required by the contract. These items total $11,258.32, for which judgment will be rendered in favor of the plaintiff. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

ON MOTION FOR NEW TRIAL

Defendant's motion for new trial was overruled June 3, 1940 in a Memorandum *Per Curiam*, as follows:

The opinion of the court states that the case of *Bowe* v. *United States*, 42 Fed. 761, has no application because it was rendered under a contract that provided no allowance should be made for extras "unless provided for beforehand by written agreement". Counsel for defendant call attention to the fact that there was a somewhat similar provision in the contract in suit with reference to extras and object to the allowance of $1,643.54 for metal ducts upon the ground that the evidence does not show that this provision was complied with. This provision does not militate against the conclusion of the court. The court did not hold that the metal ducts were extras. We think the word "extra" as used in the contract refers to some work or material which was not mentioned in the contract. In the instant case the metal ducts were specified in the contract, but, as we held in the opinion, it was provided that they should be supplied by another contractor and it was simply a violation of the contract to require plaintiff to supply them. Plaintiff, however, had no choice but to yield to the wrongful construction placed on the contract; otherwise it would not, under defendant's view, have completed its work and been entitled to receive anything whatever. What we have said above should not be considered as implying that we agree with all that is said in the *Bowe case*, *supra.* We do not, but think it is not necessary to further discuss this matter.

The motion for new trial must be overruled. It is so ordered.

WHITAKER, *Judge*, took no part in the decision of this case.

CHARLES C. CROGGON, WILLIAM H. BELL, EDWARD FULLER, RAYMOND C. REIK, TRADING UNDER THE NAME OF HASKINS & SELLS, v. THE UNITED STATES

[No. 43024. Decided March 4, 1940. Defendant's motion for new trial overruled June 3, 1940]

On the Proofs

Authority of Federal Home Loan Bank Board to employ accountants.—In enacting sections 18 and 19 of the Federal Home Loan Act, empowering the Federal Home Loan Bank Board to select, employ, and fix the compensation of its officers, employes, and agents without regard to the provisions of other laws applicable to the employment or compensation of officers, employes, attorneys, and agents of the United States, Congress was cognizant of section 5 of the Act of April 6, 1914, prohibiting the employment of any accountants or other experts without statutory authority.

Same.—In enacting a new statute the legislature is presumed to know the existing law.

Same.—In the case of one statute dealing with a subject in a general and comprehensive way and a later statute dealing with part of the same subject in a more definite way, the later statute will prevail.

The Reporter's statement of the case:

Mr. George E. H. Goodner, for the plaintiffs. *Mr. D. F. Prince* was on the briefs.

Mr. Willard B. Cowles, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Paul A. Sweeney* was on the briefs.

The court made special findings of fact as follows:

1. The plaintiffs are, and at all times material hereto have been, partners engaged in the practice of accountancy in the City of Baltimore, Maryland, using the firm name of "Haskins & Sells." The plaintiff, Charles C. Croggon, is the

managing partner, and is empowered to contract for and on behalf of the partnership.

2. On or about August 30, 1932, the Federal Home Loan Bank Board employed the plaintiffs to devise and prepare accounting forms, to prescribe the procedure thereunder for the conduct of the operations of twelve regional Federal Home Loan Banks, and the necessary reports to be made by such banks to the board at Washington, D. C., and to perform other services necessary and incident to the carrying out of the engagement.

3. Said employment agreement provided that the plaintiffs should be compensated for such services at the rate of $25.00 per day, plus subsistence expenses for persons engaged on such work, when away from cities where the plaintiffs had offices, at a rate not exceeding $5.00 per day, together with all traveling expenses, including first-class railroad fares and pullman fares and subsistence of those persons engaged on the work in going to or returning from such engagements.

4. Plaintiffs began work under the contract on September 1, 1932, and completed all the details thereof on or before November 30, 1932. On November 16, 1932, the blank forms and procedure prescribed thereunder were approved and accepted by the Federal Home Loan Bank Board, and the board ordered such forms and procedure to be printed and distributed to the newly created banks.

5. On December 5, 1932, plaintiffs rendered a bill to the Federal Home Loan Bank Board for $4,560.72 in full for all services performed and expenses incurred by plaintiffs under the contract, and requested payment thereof. On December 21, 1933, the board approved the bill and transmitted it to the General Accounting Office for preaudit before payment. The General Accounting Office refused to authorize the payment of the bill on the ground that the board was not authorized by law to make an agreement of that character.

6. Plaintiffs have repeatedly demanded payment of this account, both from the Federal Home Loan Bank Board and the Comptroller General of the United States, but neither the bill nor any part thereof has been paid.

7. Plaintiffs are the sole owners of the claim herein sued upon, and no action has been had thereon, except as stated in their petition.

DEFENDANT'S COUNTERCLAIM

8. Charles C. Croggon, William H. Bell, Edward Fuller, and Raymond C. Reik, engaged as partners in the practice of accountancy in the City of Baltimore, Maryland, under the firm name of "Haskins & Sells" are also members of the partnership of Haskins & Sells with executive offices at 67 Broad Street, New York, New York. It is stipulated herein that for the purposes of the plaintiff's suit and the defendant's counterclaim, Haskins & Sells of Baltimore and Haskins & Sells of 67 Broad Street, New York, New York, are one and the same party.

9. Haskins & Sells of New York, New York, by virtue of a verbal contract entered into with the Secretary of Agriculture, between February 1, 1932, and March 3, 1933, inaugurated and developed accounting procedure for crop production loans made by the Secretary of Agriculture under the Act of January 22, 1932. For these services the firm of Haskins & Sells was paid as follows:

Voucher No.		
7	March 1932	$1,002.75
701	April 1932	1,748.37
2175	May 1932	177.90
2319	May 1932	1,751.05
7740	July 1932	2,027.25
10092	July 1932	1,719.94
14465	August 1932	1,865.19
17871	September 1932	1,941.97
22026	October 1932	1,774.60
26207	November 1932	1,774.39
31086	January 1933	1,266.50
33584	February 1933	1,154.46
45180	May 1933	1,158.26
		19,362.63

10. Under date of April 19, 1934, the Comptroller General notified the office of the Secretary of Agriculture of the disallowance of the various vouchers issued to Haskins & Sells for the inauguration and development of accounting procedure for crop production loans. On November 7, 1934,

the Comptroller General gave formal notice of the disallowance of these vouchers and payments.

11. Arthur M. Hyde was Secretary of Agriculture throughout the year 1932. Mr. Hyde, before entering into this contract with Haskins & Sells, consulted with the then Attorney General as to the legality of such contract. Relying on the oral advice given by the Attorney General, Mr. Hyde consummated the contract. The Attorney General subsequently confirmed the oral advice in a written opinion.

12. Secretary Hyde, in dealings with Haskins & Sells, presumed to act as agent of the Reconstruction Finance Corporation, under the Act of Congress creating that corporation. The Reconstruction Finance Corporation turned over moneys to Secretary Hyde to be loaned to the farmers, and he delegated to others authority to loan it. All moneys so turned over were deposited in the United States Treasury in a special account entitled, "The Secretary of Agriculture, acting pursuant to the Act of Congress approved January 22, 1932, creating the Reconstruction Finance Corporation," and designated by the symbols 93–306. Said title had been suggested by the Attorney General. Secretary Hyde in administering the loan had a separate organization, independent of the regular Agriculture Department organization, known as the Crop Production Loan Office.

Haskins & Sells rendered bills periodically to "Secretary of Agriculture, acting pursuant to the Act of Congress, approved January 22, 1932, creating the Reconstruction Finance Corporation," as the work progressed. The first bill was dated March 7, 1932, and the last bill dated March 22, 1933. These bills were promptly paid from the fund deposited in the Treasury by the Reconstruction Finance Corporation.

13. No part of the sum of $19,362.63 so paid to Haskins & Sells of New York has been refunded to the United States.

The court decided that the plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiffs, on or about August 30, 1932, were employed by the Federal Home Loan Bank Board to devise and

prepare accounting forms, to prescribe the procedure thereunder for the conduct of the operations of twelve regional Federal Home Loan Banks, and the necessary reports to be made by such banks to the board at Washington, D. C., and to perform other services necessary and incident to the carrying out of the engagement.

Plaintiffs promptly began work and completed the same without delay. The blank forms and procedure thereunder were approved and accepted by the Federal Home Loan Bank Board, and the board ordered such forms and procedure to be printed and distributed to the newly created banks. Plaintiffs thereafter rendered a bill to the Federal Home Loan Bank Board for $4,560.72 in full for all services performed and expenses incurred by them under the contract, and requested payment thereof. The board duly approved plaintiff's bill and transmitted it to the General Accounting Office for preaudit before payment. The General Accounting Office refused to authorize payment of the bill on the ground that the board was not authorized by law to make an agreement of that character. The bill has never been paid, hence this suit.

The refusal of the General Accounting Office to authorize the payment of plaintiffs' bill was based on the provisions of section 5 of the act of April 6, 1914, 38 Stat. 335, Title 5, U. S. C. A. Sec. 55, which provides as follows:

> No part of any money appropriated in any Act shall be used for compensation or payment of expenses of accountants or other experts inaugurating new or changing old methods of transacting the business of the United States * * *, unless authority for employment of such services or payment of such expenses is stated in specific terms in the Act making provision therefor and the rate of compensation for such services or expenses is specifically fixed therein.

It may be conceded that this provision of law, if standing alone, would justify the decision of the General Accounting Office in refusing to pay plaintiffs' bill. It does not stand alone, however, and we are of the opinion from the language used by Congress in the Federal Home Loan Bank Act, that it was not intended that it should apply to the Federal Home Loan Board in the selection of its employees and agents.

Section 18 of that Act, 47 Stat. 737, Title 12, U. S. C. A. 1438, 1439, provides:

> There is hereby authorized to be appropriated the sum of not to exceed $300,000 for salaries, travel and subsistence expenses, rents, printing and binding, furniture and equipment, lawbooks, books of reference, periodicals, newspapers, maps, contract stenographic reporting services, telephone and telegraph services, and all other necessary expenses of the Board, together with expenses preliminary to the organization and establishment of the banks created hereunder, until the end of the fiscal year 1933.

Section 19 carries the further provision:

> The board shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the performance of its duties under this chapter without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, and agents of the United States. * * *; and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid.

It is a familiar rule of construction that in enacting a new statute the legislature is presumed to know the existing law (*In re McKenzie*, 142 Fed. 383), and it must be presumed in this case that Congress in enacting sections 18 and 19 of the Federal Home Loan Act was cognizant of section 5 of the act of April 6, 1914, *supra*, and intended that the board should not be controlled by the general provisions of that Act. It is a further well-recognized rule of statutory construction that, in the case of one statute dealing with a subject in a general and comprehensive way and a later statute deals with part of the same subject in a more definite and minute way, the later statute will prevail. *Snitkin* v. *United States*, 265 Fed. 489; *Jackson* v. *Cravens*, 238 Fed. 117. In the instant case the Federal Home Loan Bank Act in sections 18 and 19 deals with the matters of the expenditures of the board in a specific and definite manner. The provisions of this Act must prevail over the general provision contained in the act of April 6, 1914. The plaintiff is therefore entitled to a judgment of $4,560.72 on its claim.

The defendant has filed a counterclaim in the sum of $19,362.63, which remains to be considered.

By the act of January 22, 1932, 47 Stat. 5, Congress created the Reconstruction Finance Corporation for the purpose of lending money to various enterprises. The Act set aside $50,000,000 of the capital of the corporation to be loaned by the Secretary of Agriculture to farmers. This sum was deposited in the United States Treasury in a special account entitled "The Secretary of Agriculture, acting pursuant to the Act of Congress approved January 22, 1932, creating the Reconstruction Finance Corporation." Following the passage of this Act plaintiffs were employed by the Secretary of Agriculture to inaugurate and develop accounting procedure for crop production loans to be made by the Secretary of Agriculture from the aforesaid fund. Plaintiffs entered upon their work and completed it prior to March 3, 1933, and for their services were paid the sum of $19,362.63, in installments, the last payment being in May 1933. Payments were made from the fund deposited in the Treasury by the Reconstruction Finance Corporation as stated above.

In 1934 the Comptroller General notified the Secretary of Agriculture of his disallowance of the vouchers and payments issued to plaintiffs and pursuant to such disallowance the defendant now pleads as a counterclaim the amount so paid plaintiffs, $19,362.63. The defendant contends that the payments of these sums to plaintiffs were illegal because of the provision of section 5 of the act of April 6, 1914, which has heretofore been quoted and need not be restated. This provision is not applicable here for the reason that the Secretary of Agriculture was acting as the agent of the Reconstruction Finance Corporation in the employment of plaintiffs and in the payment of their compensation (37 Op. Atty. Gen. 1).

Section 4 of the Act creating the Reconstruction Finance Corporation provided that the Reconstruction Finance Corporation should have power—

> to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of the business of the corporation, without regard to the provisions of other laws

Syllabus

applicable to the employment and compensation of officers or employees of the United States. * * *

The Board of Directors of the corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

The Secretary of Agriculture, acting as an agent of the Reconstruction Finance Corporation, had all the powers of that corporation to the extent not specifically restricted. It follows therefore that if the Reconstruction Finance Corporation could select its own employees and compensate them "without regard to the provisions of other laws," the Secretary of Agriculture had the same powers, as agent of the corporation, in the absence of any restrictions in the Act. It is therefore held that the disbursements made by the Secretary of Agriculture, which form the basis of the counterclaim, were legally made. The counterclaim must be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED v. THE UNITED STATES

[No. 42696. Decided April 1, 1940]*

On the Proofs

Government contract; illegal cancellation and termination.—On May 28, 1919, plaintiff entered into a contract with the Chief of Engineers, U. S. Army, whereby certain barges and towboats, then under construction, were leased to the plaintiff for a term of five years, with option to purchase, and on May 26, 1921, a supplemental agreement was entered into between the parties with respect to a runway and unloading facilities, which supplemental agreement was complied with by plaintiff. On March 3, 1923, the Secretary of War, without the knowledge or approval of the Chief of Engineers, by letter addressed to plaintiff declared the contract and supplemental agreement cancelled and terminated, under the provisions of the contract;

*Appealed.

and on March 25, 1923, the barges and towboats were forcibly seized and taken over by a representative of the United States Government, under instructions, dated March 22, 1923, from the Acting Secretary of War, without the knowledge of the Chief of Engineers. During the pendency of a suit in the Federal courts growing out of the matters described, a letter addressed to plaintiff dated April 27, 1923, and signed by the Chief of Engineers, was served on plaintiff, notifying plaintiff that the contract and supplemental agreement were cancelled and terminated, such letter having been signed by the Chief of Engineers at the direction of the Secretary of War, and not representing the uninfluenced judgment of the Chief of Engineers.

Held:

1. The plaintiff was illegally and wrongfully deprived of his lease and option to purchase.
2. The plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and he alone could act.
3. The Secretary of War had no authority under the contract to exercise the right conferred by the contract upon the Chief of Engineers.
4. The action of the Secretary of War in cancelling the contract was *ultra vires.*
5. The action of the Acting Secretary of War in ordering the seizure of the fleet was a tortious act.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiffs. *Messrs. Richard E. Dwight, Frederick W. P. Lorenzen,* and *Dwight, Harris, Koegel & Caskey* were on the briefs.

Mr. Alexander Holtzoff, with whom *Mr. Assistant Attorney General Francis M. Shea,* for the defendant. *Mr. Herbert A. Bergson* was on the brief.

The court made special findings of fact as follows:

1. Edward F. Goltra, the original plaintiff in this suit, at all times herein pertinent, was a citizen of the United States and a resident of St. Louis, Missouri.

Since the institution of this suit, Edward F. Goltra on April 2, 1939, departed this life, leaving as his executors Kate B. Goltra and E. Field Goltra, Jr., who have been substituted as plaintiffs. Wherever the word "plaintiff" is used herein, reference is made to Edward F. Goltra and not the executors.

2. The petition herein was filed July 21, 1934, pursuant to Private Act approved by the President on April 18, 1934, as follows:

AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided*, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further*, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

3. In the year 1917, after this country had entered the World War, traffic conditions in the Mississippi Valley became acute because of the inadequacy of rail transportation facilities, and defendant investigated the feasibility of developing river transportation facilities. Plaintiff, in cooperation with defendant, at his own risk and expense, conducted practical experiments as to the commercial feasibility of transporting coal from St. Louis to St. Paul and iron ore in the reverse direction by means of barges on the Mississippi River, and also conducted an experimental trip carrying

knocked down ballast cars on barges from St. Louis to New Orleans to be sent to the armies of defendant in France. As a result of these experiments the engineers of the Corps of Engineers of the Army obtained information necessary in order to prepare specifications and designs for a fleet of barges for operation on the Mississippi River. Plaintiff reported the results of these experiments to the President of the United States and asked that defendant give financial aid in defraying the cost of building a fleet such as is described in the next finding. Plaintiff offered to take over the vessels when completed, operate them, and reimburse the Government for the cost thereof in any fair manner.

4. Thereafter, as a wartime measure, defendant entered into contracts for the construction of 19 steel barges and planned the construction of 4 steel towboats to tow the barges. The barges and towboats were later built and became the property of defendant.

5. On March 1, 1919, plaintiff sent a letter to the Secretary of War relating to these boats and barges. In that letter he recited facts with respect to his efforts on the Mississippi River in 1917 substantially as stated in Finding 3 and concluded as follows:

> As the whole project will now before long be consummated, I desire to enter into an agreement for the operating and taking over of the whole project. In view of the fact that it has been generally understood that I was to take over the facilities, I have been preparing myself by acquiring the necessary fuel properties and ore properties and real estate for the terminal facilities, and I feel that I should no longer be left without an agreement reduced to writing covering this matter.
>
> I respectfully refer you to your letter of the 25th of October 1917, addressed to Mr. E. N. Hurley, and also your letter of December 13, 1918, addressed to the Emergency Fleet Corporation, and to say in conclusion modestly as I can, that the entire inland waterway traffic matter took on form and substance as the direct result of the work I did on the Mississippi River in the Spring and Summer of 1917, and that the Inland Waterways Commission was an afterthought and result of said activities and was formed long after the moral obligation at least, of turning over these vessels to me was entered into.

6. On May 28, 1919, plaintiff and defendant entered into a contract (hereinafter referred to as the "original contract"), and on May 26, 1921, plaintiff and defendant supplemented the original contract by a contract (hereinafter referred to as the "supplement contract"). Both these contracts were prepared and drafted by the defendant, and were signed by the Chief of Engineers as party of the first part and by the plaintiff as party of the second part. A copy of the original contract is Exhibit B to the petition and a copy of the supplemental contract is Exhibit C to the petition and both are made a part of these findings by reference.

7. At all times herein pertinent and material, there was stationed at St. Louis an officer of the corps of engineers of the United States Army called "District Engineer." Among the functions of this officer was the duty of representing the Chief of Engineers in connection with the performance by the respective parties of the original contract and the supplemental contract and in supervising plaintiff's performance of the contracts.

8. From the year 1920 a fleet of barges and towboats known as the "Mississippi Warrior Service" has been operated in the transportation of freight as a common carrier on the Mississippi River between St. Louis and New Orleans and on the Warrior River. From 1920 to about June 1924 the Mississippi Warrior Service was conducted as one section of a division in the War Department known as the Inland and Coastwise Waterways Service, and from about June 1924 until the present time it has been conducted by Inland Waterways Corporation, a corporation organized under chapter 243 of the Act of Congress of June 3, 1924 (43 Stat. 360, 49 U. S. C. 151–6), the stock of which has at all times been wholly owned by defendant. At all times herein pertinent and material, the Mississippi Warrior Service was permitted by defendant to carry and did carry practically all classes of the more common freight available for transportation on the Mississippi River at rates of 80 percent of the prevailing rail rates.

9. On March 2, 1921, plaintiff sent a letter to the Chief of Engineers as follows:

> I am asked by various river cities to quote a definite rate to them for transportation of commodities by means of the boats and barges being constructed under my government contract. The different municipalities are in the process of installing terminal facilities and find that it is necessary to have definitely set forth by the Secretary of War what rates they may expect.
>
> I respectfully suggest that I be authorized to quote them the same rates as obtained on the Government Barge Line now operating on the lower river, viz—80% of the all-rail rates that now obtain.
>
> Will you be good enough, if you approve of my suggestion, to communicate with the Secretary of War, notifying him of same.

The "Government Barge Line" referred to in this letter was the Mississippi Warrior Service. On March 3, 1921, the Acting Chief of Engineers sent a letter to the Secretary of War which contains the following:

> It is represented by the lessee that it would be advantageous to the operation of the vessels if the rates of transportation should be fixed at 80 percent of the prevailing rail tariffs. These are the rates charged on the government line now operating below St. Louis, and in my opinion it would be in the interest of the shipping public to permit the same rates to be charged on this line. I accordingly recommend that the Secretary of War give his consent thereto.

On March 4, 1921, the Secretary of War gave his consent under the original contract to plaintiff's operation of the barges and towboats at rates less than the prevailing rail tariffs, i. e., 80 percent thereof. On or about March 10, 1921, plaintiff received from the office of the Chief of Engineers notification of such consent, and on or about March 14, 1921, he received from the District Engineer a copy of the letter of March 3, 1921, and the Secretary of War's endorsement thereon.

10. In the latter part of March 1922 plaintiff notified the Chief of Engineers that he was exercising his option to purchase the barges, towboats and unloading facilities, that he

had appointed an appraiser for that purpose, and that he desired the Chief of Engineers to appoint another appraiser. The Chief of Engineers, April 1, 1922, refused to appoint another appraiser at that time on the ground that the terms of the lease had not yet begun to run.

11. On March 31, 1922, the Secretary of War sent a letter to plaintiff as follows:

> I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to make rates on the lower Mississippi at eighty percent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But in any case, I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.
>
> I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty percent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.
>
> Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement.

The barge line referred to in this letter was the Mississippi Warrior Service. At the time when the letter was written, General Downey, referred to therein, was Chief of the Inland and Coastwise Waterways Service. The letter was released to the newspapers prior to the receipt thereof by plaintiff and was quoted in an article which appeared in the St. Louis Post-Dispatch on April 2, 1922, under a Washington date line bearing the date April 1.

12. On April 18, 1922, plaintiff had a meeting with the Secretary of War in Washington and at that time insisted that he had in writing been given the right to operate the barges and towboats at 80 percent of the full rail rates.

The Secretary of War denied that plaintiff had a right to operate the barges and towboats at less than the full rail rates and stated that the delivery of the barges and towboats to plaintiff should be postponed until the Secretary of War had obtained legal advice with respect to plaintiff's rights.

13. Before the meeting with the Secretary of War on April 18, 1922, plaintiff went to the office of the Interstate Commerce Commission to arrange for filing certain barge line rates to be effective when the barges and towboats should be delivered to him, and after the meeting with the Secretary of War an official of the Interstate Commerce Commission informed plaintiff that he could not file his rates as long as the Secretary of War asserted the right to control plaintiff's rates.

14. On May 6, 1922, the Secretary of War sent a letter to plaintiff as follows:

> You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract #E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80% of the prevailing rail tariffs, is hereby withdrawn and cancelled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereafter made and entered into by you.
>
> From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of Saint Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved.

On May 25, 1922, the Secretary of War sent a letter to plaintiff, the body of which is in part as follows:

> In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the follow-

ing articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all rail rates:

Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.

Due to the conditions limiting the amount of grain which may be handled through New Orleans, and due to the limited elevator capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it.

15. On July 15, 1922, defendant delivered to plaintiff at St. Louis the 19 barges and 4 towboats.

The towboats delivered to the plaintiff were in all respects identical. Each was of the stern-paddle wheel type, equipped with a coal-burning steam engine rated at approximately 2,000 horsepower, was of 300-foot length over all, 58-foot beam and 10-foot depth of hold, and had a draft of approximately 4 feet with a light load of fuel and of approximately 5½ feet with a usual load of fuel.

The barges, when delivered to plaintiff, were in all respects identical and each was of steel construction with a spoon shaped bow especially designed for easy towing. Each of the barges was of 300-foot length, 48-foot beam, and 10-foot depth of hold, having a draft of approximately 19 inches when light, and a draft of 9 feet with a maximum load of 3,000 tons. Each of the barges had a double bottom and sides which, together with bulkheads, created 22 water- and oil-tight compartments between the outer and inner shells for carrying of all kind of liquid cargoes, including crude oil and its derivative products; and each of the barges was completely equipped for loading and unloading liquid cargo by means of a 6-inch pipe system. Each of the barges also had an open cargo hold suitable for carrying materials or commodities not requiring protection from the weather. None of the barges was equipped to carry grain or other perishable

commodities, but they could have been converted into barges capable of carrying such commodities by the construction of covers, roofs, or cargo boxes thereon. The barges were the most advanced in type of any river barge constructed and up to the present time are the only barges of this type on the Mississippi River.

16. Soon after the delivery of the fleet, it was discovered that the firing mechanism of the towboats was inefficient, and plaintiff, in order to remedy this condition, installed oil-burning equipment on the towboat *Illinois*. This change proved effective.

17. On August 7, 1922, immediately after the oil-burning equipment had been installed on the towboat *Illinois*, plaintiff, with the approval of the District Engineer, caused this towboat and several of the barges to depart from St. Louis for Caseyville, Kentucky, situated on the Ohio River, to carry coal which had been offered to plaintiff for transportation from Caseyville, Kentucky, to the vicinity of St. Louis. The towboat *Illinois* and four of the barges returned to St. Louis on September 9, 1922. On the trip to and from Caseyville, the towboat *Illinois* carried a very light load of fuel, and the barges were empty on the way to Caseyville and loaded light to but a small fraction of their capacity on the return trip. The operation of the towboat and barges on the trip to and from Caseyville was interfered with by the very low water, groundings, and delays occasioned by the necessity of waiting for dredges to clear crossing and dredging necessary beneath the coal tipple at Caseyville. During this trip mechanical breakdowns of the towboat *Illinois* occurred and general repairs and alterations were made on this towboat.

Experience on the trip to Caseyville and return indicated the necessity or desirability of making certain additions and changes on the towboat *Illinois* for its efficient operation and they were made between September 9, 1922, and September 26, 1922, by plaintiff's employees after the return of this towboat to St. Louis.

On September 26, 1922, plaintiff, with the approval of the District Engineer, caused the towboat *Illinois* and certain of the barges to depart for Hannibal, Missouri, to load a

cargo of cement which the district office of the Corps of Engineers of the United States Army at Cincinnati, Ohio, wished to have transported to that point. The towboat *Illinois* and the barges experienced great difficulty on the trip to Hannibal by reason of extremely low water and the barges were loaded with cement at Hannibal to but a small fraction of their capacity. Nevertheless, the towboat and the barges experienced great difficulty by reason of low water on the trip from Hannibal to East St. Louis, Illinois. At the latter point plaintiff was advised that by reason of low water it would be impossible to navigate on the Ohio River, and the Corps of Engineers at Cincinnati ordered plaintiff to unload the cargo of cement at East St. Louis for shipment by rail to Cincinnati. The towboat *Illinois* also experienced mechanical trouble on this trip, and repairs were made during the trip by plaintiff's employees. The towboat *Illinois* returned to the plaintiff's docks in St. Louis on October 14, 1922.

From October 14, 1922, until the end of November 1922, the towboat *Illinois* was tied up at plaintiff's docks in St. Louis with steam up and crew on board ready to tow any of the barges. While the towboat was so tied up further additions, changes, and repairs which were necessary or desirable for its efficient operation were made by plaintiff's employees.

Plaintiff did not operate the other three towboats during the period from July 15, 1922, to December 1, 1922.

18. About December 1, 1922, the plaintiff, with the approval and consent of the District Engineer, caused the barges and towboats to be placed in winter quarters where plaintiff expected to keep them until navigation could safely be resumed in 1923. For many years prior thereto it was customary at St. Louis to place commercial barges and towboats into winter quarters about December 1st and leave them there until sometime in March, in order to protect them from damage from ice and other winter elements. During this period it was unsafe to take such vessels out of winter quarters even though the river might be free of ice because of the risk of injury due to sudden changes in the weather.

19. On December 13, 1922, Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, of which the Mississippi Warrior Service was a section, sent a letter to plaintiff, as follows:

> On May 25, 1922, you were authorized to carry certain articles on the Mississippi River and its tributaries at not less than 80% of the all rail rates. Amongst them was "grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity."
>
> The Secretary of War now authorizes you to carry any and all grain at not less than 80% of the all-rail rates that you can secure, regardless of the capacity of the Mississippi-Warrior Service to handle such commodity, and without any further action on your part being necessary. Please acknowledge the receipt of this letter.
>
> It is to be hoped that you will cooperate with the Mississippi-Warrior Service in your grain operations to such an extent that neither you nor they will be handicapped by the grouping of a number of barges at New Orleans loaded with grain which cannot be discharged promptly.
>
> A copy of this communication has been sent to the Grain Dealers Association of St. Louis, to Mr. Brent, and to the District Engineer Officer in St. Louis, for their information and guidance.

At the time when this letter was written, Colonel Ashburn and defendant knew that the barges and towboats were in winter quarters from which they could not then be removed without serious danger of injury, and that the barges were not then equipped to carry grain.

20. On January 5, 1923, the Secretary of War sent a memorandum to the Chief of Engineers as follows:

> 1. I am returning the audit of the accounts of the Goltra Barge Line for the period July 15th–October 15, 1922, with memoranda from the Chief of Inland and Coastwise Waterways Service and from the Judge Advocate General attached thereto for your consideration.
>
> 2. According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity. Suitable instructions should, therefore, be given the District Engineer at St. Louis that all future reports of operation will include the information necessary to clearly establish the right of the Government to take such action in the event of the failure of the lessee to carry out the terms of the contract.

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3. You will inform Mr. Goltra that it is the view of the War Department that the fleet should be operated to the maximum, and failure to operate, if practicable, is a violation of the contract.

On January 16, 1923, the chief legal adviser to the Chief of Engineers submitted a memorandum to the Chief of Engineers, of which a paragraph reads as follows:

> If Mr. Goltra carried all of the freight offered him during the period, or up to the capacity of his barge line, then he has fully complied with the contract, and if he was ready at all times to carry freight of the kind contemplated by the contract which might be offered him, he would then be within the terms of his contract although none or very little might be offered, nor would the contract compel him to operate the fleet if the physical conditions on the river render it impracticable to do so.

On January 19, 1923, the Assistant Chief of Engineers forwarded to the District Engineer a draft of letter to be signed by the District Engineer and delivered to the plaintiff in accordance with the instructions of the Secretary of War. This letter was delivered to plaintiff by the District Engineer on January 29, 1923. The letter reads as follows:

> The Secretary of War has received a number of communications from commercial organizations interested in transportation on the Mississippi River complaining of the inactivity of the fleet of barges and towboats leased by you from the Government. He has also had under consideration my report of the audit of accounts of the operation of this fleet as made to October 15, 1922. This report, as you are aware, indicates a but limited movement of trade during the past season.
>
> The Secretary is not satisfied that the operation of the fleet has been as adequate and as vigorous as the last contract of May 28, 1919, contemplates and requires.
>
> The Secretary of War has therefore directed that you be informed that it is the view of the Department that during the period when navigation is practicable the fleet should be operated to the maximum and that failure to so operate it will be regarded as a violation of the contract.

21. Prior to the delivery to him of the letter dated January 19, 1923, plaintiff had, on January 15, 1923, sent a letter

to the District Engineer requesting that certain dredging be done in the Mississippi River in front of the unloading facilities to enable barges to get into position for loading and unloading. The letter contained the following:

> We propose to begin operating the fleet as soon as the season opens, bringing in coal, ore, and other commodities, and I respectfully request that the dipper dredge which has been in this section and is now at work at Commerce, be detailed to do this dredging, in order to put the channel in shape, as soon as it completes the work upon which it is engaged at present.
>
> While it will only take it a short time to do this work, nevertheless, February will soon be here and over, and we ought to be in position to start the fleet by the first of March, unless ice prevents.

22. While the towboats and barges were in winter quarters, plaintiff's employees were protecting the barges and towboats and were making alterations and repairs on some of them.

23. No representative of defendant ordered plaintiff to take the barges and towboats out of winter quarters. While the towboats and barges were still in winter quarters, the Secretary of War on March 3, 1923, transmitted to Colonel Ashburn, the Chief of the Inland and Coastwise Waterways Service, a letter addressed to plaintiff, with written instructions for the delivery of the letter to plaintiff, the body of which letter is as follows:

> Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.
>
> I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel

T. Q. Ashburn, Chief Inland and Coastwise Waterways Service, who will deliver this notice and who is instructed and authorized to receive and receipt for the property herein mentioned.

On the same day when the letter and instructions were transmitted to Ashburn, which was a Saturday, plaintiff was in Washington and Ashburn delivered the letter to plaintiff in Washington during the afternoon of Sunday, March 4, 1923.

24. Prior to the delivery to plaintiff of the letter of March 3, 1923, from the Secretary of War, plaintiff had no notice or knowledge of any intention on the part of the Secretary of War to attempt to terminate the original contract or the supplemental contract, and the Chief of Engineers had not been consulted by the Secretary of War about terminating the contracts and did not know of the action of the Secretary of War in sending the letter until some time after the delivery thereof.

25. On March 8, 1923, plaintiff sent a letter to the Secretary of War, the body of which is as follows:

On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges, and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

This notice was served upon me while I was in Washington on other business, and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have in face of most unjust inter-

ference and restrictions fully complied with all the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice I now request.

Plaintiff never received any reply to this letter and was never granted the hearing requested in the letter.

26. Thereafter plaintiff caused the towboat *Illinois* to be prepared to resume operation and plaintiff caused it to have steam up and be ready to leave St. Louis for Caseyville, Kentucky, on Monday morning, March 26, 1923, in order to tow some of the barges from the latter point with a cargo of coal which had there been offered for transportation.

27. On March 22, 1923, the Acting Secretary of War transmitted a memorandum to Ashburn, Chief of the Inland and Coastwise Waterways Service as follows:

1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward F. Goltra under a contract dated May 28th, 1919.

2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once.

28. On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's

employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States.

29. The Chief of Engineers did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred.

30. The District Engineer at St. Louis did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred. On March 26, 1923, the District Engineer, learning about the seizure, pursued the seized vessels down the Mississippi River because he deemed himself officially responsible for the vessels, but upon being shown a letter from the Acting Secretary of War directing Ashburn to seize the barges and towboats he returned to St. Louis.

31. Prior to the seizure of the barges and towboats on March 25, 1923, the Chief of Engineers had not arrived at any judgment or conclusion or rendered any report to any one to the effect that plaintiff had in any manner failed to perform any of his obligations under the contracts.

32. Commercial operation of barges and towboats of the same general type as plaintiff's in or out of St. Louis did not commence in the year 1923 prior to the seizure of the barges and towboats by Ashburn, and the Mississippi-Warrior Service did not operate any commercial tow in or out of St. Louis in the year 1923 prior to the seizure.

33. At the time of their seizure the barges and towboats were in good condition and repair and contained all of the alterations and repairs which plaintiff had placed thereon since delivery to him by defendant on July 15, 1922.

34. At all times from the delivery of the barges and towboats to plaintiff on July 15, 1922, until the seizure thereof on March 25, 1923, plaintiff, in connection with his operation and maintenance of the barges and towboats as a common carrier, maintained barge line docks with railroad connection and unloading facilities in St. Louis, offices in St. Louis equipped with telephone service, signs indicating to the public the location of the docks and offices of the Goltra

barge line, and stationery indicating the offices of the Goltra barge line, and maintained a staff of employees to perform all services in connection with the operation and maintenance of the barges and towboats.

Plaintiff also held himself out as a common carrier by means of the barges and towboats between points on the Mississippi River and its tributaries of all cargo suitable for transportation by means of barges and towboats, which might be offered to him by anyone and was ready, willing, and able to transport such cargo. During this time plaintiff solicited business and endeavored to get cargo for transportation, and it was well known in the Mississippi Valley that he had the barges and towboats and was seeking business therefor.

35. During the late summer and fall of 1922, and winter of 1922–23, the water in the Mississippi River and its tributaries was lower than it had ever been in recorded history. During that period the low water and peculiar channel conditions caused the grounding of many barges and towboats, including those operated by the Mississippi Warrior Service.

Barges and towboats could only be operated on the Mississippi River above St. Louis and below St. Louis to Cairo and on the Ohio River under great difficulties due to low water, which resulted in groundings, delay, and damage even with light and unprofitable loads.

There was no possible cargo offered to plaintiff except that hauled by him and referred to in finding 17. From July 15, 1922, to March 25, 1923, plaintiff, as a common carrier, transported by means of the barges and towboats all the cargo offered that the barges were equipped to carry.

36. After Ashburn had seized the barges and towboats, a suit was commenced on plaintiff's behalf in the District Court of the United States for the Eastern District of Missouri against the Secretary of War, Ashburn, and the United States District Attorney at St. Louis, and a bill of complaint was filed therein. In the bill of complaint, plaintiff prayed, among other things, for temporary and permanent injunctive relief looking toward the restoration to him of the towboats and barges and the unloading facilities, and restraining defendants from interfering with plaintiff's possession

thereof and an adjudication of plaintiff's rights under the original and supplemental contracts. On the same day, plaintiff was granted a temporary restraining order requiring defendants to restore to plaintiff possession of all of the towboats and barges which had been seized, and requiring defendants to show cause why temporary injunction should not issue.

37. The temporary restraining order and order to show cause, together with the bill of complaint, was served upon Ashburn as he was proceeding south on the Mississippi River with the towboats and barges which he had seized. Ashburn made a motion to quash said service, which motion was denied and Ashburn was ordered to return the towboats and barges to the jurisdiction of the court at the Port of St. Louis, Missouri. Thereafter, the towboats and barges remained in the custody of defendant until September 1924.

38. On or about April 27, 1923, General Lansing H. Beach, Chief of Engineers, signed a letter which reads as follows:

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, April 27, 1923.

E. F. GOLTRA, Esq.,
La Salle Building,
St. Louis, Missouri.

SIR: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.

I, therefore, declare the said contract and the supplement thereto, terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession to the United States of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States.

Very truly yours,

(Signed) LANSING H. BEACH,
Lansing H. Beach,
Major General, Chief of Engineers.

This letter was signed by General Beach at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers.

39. On September 4, 1924, after a hearing, Honorable C. B. Faris, United States District Judge, made an order granting temporary injunction which required the defendant forthwith to restore to plaintiff at the Port of St. Louis all of the barges, towboats, and other facilities and appliances seized by defendants, subject to an accounting for damages resulting from the use and possession of the property since the seizure thereof and restraining those defendants from taking any of the property from plaintiff's possession until further order of the court.

40. The order granting the temporary injunction was reversed on appeal on July 23, 1925, by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 7 F. (2d) 838, and on June 7, 1926, on writ of certiorari, the Supreme Court of the United States, in a decision reported in 271 U. S. 536, affirmed the decision of the Circuit Court of Appeals. Thereupon, between June 23, 1926, and August 1926, pursuant to and acting upon the mandate of the Supreme Court, defendant resumed the possession of the towboats, barges, and unloading facilities which had been acquired by defendant on March 25, 1923, but had been interrupted by the temporary injunction of September 4, 1924. Defendant has retained possession of the boats and barges since August 1926, and has caused the same to be operated as a part of the Mississippi Warrior Service.

41. On November 7, 1927, the Judge of the District Court for the Eastern District of Missouri, finally disposed of plaintiff's litigation with the Secretary of War and Ashburn, by granting a motion to dismiss an amended and supplemental bill of complaint. On November 2, 1928, the determination of the District Court was affirmed by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 29 F. (2d) 257, and on March 11, 1929, the Supreme Court of the United States, in a decision reported in 279 U. S. 843, denied a petition for writ of certiorari.

42. On or about December 6, 1924, plaintiff again undertook to exercise his option to purchase the fleet, and for that purpose appointed an appraiser, so notifying the Chief of Engineers and requesting him likewise to appoint an appraiser. The Chief of Engineers refused the request, assigning as his reason therefor the seizure of the towboats and barges and the then pending litigation.

43. For the purchase and installation of the oil burning equipment upon the towboat *Illinois* referred to in finding 16, plaintiff spent the amount of $6,414.28, which was a reasonable expense therefor, and for which sum plaintiff has never been reimbursed.

44. For desirable or necessary repairs to and replacement of defective feed pumps on the towboat *Illinois*, plaintiff spent the amount of $1,027.23, and for other desirable or necessary additions, changes, and repairs on the towboat *Illinois*, plaintiff spent the amount of $732.11. These expenditures were reasonable and plaintiff has never been reimbursed therefor.

45. For installation of powdered coal burning equipment on the towboat *Minnesota*, which installation was desirable, plaintiff spent the amount of $7,140.89, which was a reasonable expense therefor and for which sum plaintiff has never been reimbursed.

46. At the time of the seizure of the barges and towboats on March 25, 1923, there were on the towboat *Illinois*, fuel oil and other supplies belonging to plaintiff for which plaintiff had paid, and the reasonable value of which was $5,038.44. No part of the supplies was returned to plaintiff, and he has never been reimbursed therefor.

47. When the barges and towboats were returned to plaintiff in September 1924, under the order of the United States District Court, they were damaged and in need of many repairs other than ordinary current repairs, and many parts were missing from some of the towboats. None of these conditions existed when the barges and towboats were seized. By reason of these conditions, plaintiff spent for repairs and replacements the amount of $79,474.52, which was a reasonable expense therefor and for which sum he has never been reimbursed.

48. For insurance which plaintiff was required by Section 2 (b) of the original contract to procure, he spent the amount of $21,017.73 for the period from July 15, 1922, to March 25, 1923, and the amount of $30,830.30 for the period from September 1924 to July 1926, which amounts were a reasonable expense for insurance and for which plaintiff has never been reimbursed.

49. During both periods that plaintiff was in possession of the towboats and barges he operated at a loss.

50. Pursuant to the supplemental contract, plaintiff provided, in the year 1921, at his own expense, the tract of land (hereinafter referred to as the land provided by plaintiff), and concrete runways located on part thereof, on which the unloading facilities referred to in the supplemental contract were to be erected and were to stand and operate; the remainder of the concrete runways was located on the land of the Mississippi Valley Iron Company by permission of that company procured by plaintiff, and with the consent of the District Engineer to such arrangement. The land provided by plaintiff was accreted and was located in the City of St. Louis and extended from the Mississippi River on the east to the right-of-way of the St. Louis & Iron Mountain Railroad Company (Missouri Pacific) on the west, and was directly east of the 6500 South Broadway Block in the City of St. Louis. Plaintiff caused the runways to be built at his own expense according to plans submitted by plaintiff to and approved by the District Engineer. Defendant caused the unloading facilities referred to in the supplemental contract to be erected on the concrete runways. The unloading facilities consisted of a steel travelling crane which moved along the runways. The travelling crane was a substantial structure, of great height and length and was so equipped that the bucket of the crane, having a 10-ton capacity, could be lowered over the water into the holds of barges tied to the bank of the Mississippi River alongside said tract of land, and remove cargo from the barges and deposit the same in railroad cars or other means of transportation.

The construction of the concrete runways cost plaintiff the amount of $36,061.49, which was a reasonable cost therefor and for which plaintiff has never been reimbursed.

51. For the entire periods that plaintiff was in possession of the fleet the reasonable rental value of the land provided by him for runways and loading facilities was $6,000.00.

52. On February 13, 1930, plaintiff sent a letter to the Secretary of War as follows:

> In connection with my claim against the United States and/or the Inland Waterways Corporation, arising out of the occupation of real estate owned by me in South St. Louis, Missouri, by unloading facilities erected thereon by the United States Government under the provisions of the supplemental contract between the Chief of Engineers and myself, dated May 26, 1921, I beg to advise that if the United States and/or the Inland Waterways Corporation will immediately release and convey to me the said unloading apparatus and will immediately vacate and deliver to me possession of my property upon which said apparatus is located, I will release the Government from any and all claims accruing to me account of the aforesaid supplemental contract, save only my claims for use of my property, the expense of the caretakers (Watchmen), and accrued interest on these said claims, all up to the date of the aforesaid conveyance and notice of release to me of my property.

Defendant refused to take further action upon these claims in connection with the unloading facilities and the land provided by plaintiff because of the pendency of litigation between plaintiff and Inland Waterways Corporation involving the supplemental contract. On August 13, 1930, the Acting Secretary of War sent a letter to plaintiff, the body of which is as follows:

> Referring to the conversations and correspondence heretofore had relative to an unloading apparatus erected upon lands owned by you at St. Louis, Missouri, under the provisions of a supplemental contract dated May 26, 1921, and subsequently terminated, you are advised that the United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title or interest it may be thought to have in the same.

On August 21, 1930, the plaintiff sent a letter to the Chief of Engineers, as follows:

> Herewith copy of a communication received by me from Acting Secretary of War F. H. Payne.
>
> Will you kindly advise me whether or not I am to understand that you, in your capacity as one of the parties to the supplemental contract referred to in Mr. Payne's herewith attached communication, concur in same and do now notify me you have no further use for my property and your leasing privilege under same is now by your free act positively terminated.

On August 28, 1930, the Chief of Engineers sent a letter to plaintiff, the body of which is as follows:

> 1. Reference is made to your letter of the 21st instant regarding the unloading apparatus erected on your property at St. Louis, Mo., pursuant to a certain supplemental contract dated May 26, 1921.
>
> 2. In reply you are advised that the Chief of Engineers concurs in the letter addressed to you under date of August 13, 1930, in which you were advised that the "United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same."

53. At all times the salvage value of the concrete runways was less than the cost of removing them.

Counterclaims

54. In September 1925, the defendant sold and delivered to the plaintiff 3,568.8 barrels of fuel oil, the reasonable value of which was $1.35 per barrel, or a total of $4,817.88, for which the plaintiff has not paid anything to the defendant. No demand for payment of this sum was made before the filing by the defendant of its first counterclaim in this cause.

55. On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting

to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before December 31, 1932, except that if a notice of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Collector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Collector to April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax

against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law, and interest on said tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff.

For the year 1930 plaintiff filed no income tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff.

The total of the above taxes with interest and penalties is $2,784.82.

56. The counterclaims being valid are allowable.

Taking the amount of the counterclaims and all the relevant facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims as of March 25, 1923, is $350,000.

The court decided that the plaintiff was entitled to recover.

WHALEY, Chief Justice, delivered the opinion of the court:

Before this suit was argued and submitted to the court, Edward F. Goltra departed this life on April 2, 1939, and his qualified executors were substituted as plaintiffs. Wherever the word "plaintiff" is used in this opinion, reference is made to Edward F. Goltra and not to the substituted plaintiffs.

This case was brought to the court under a special jurisdictional act, 48 Stat. 1322, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *

It will be seen that this act not only waives the statute of limitations but orders the court to hear, consider, and render judgment notwithstanding any previous court decisions and to give just compensation for the claims of plaintiff for the taking of certain vessels and unloading apparatus under orders of the Acting Secretary of War, whether the taking was tortious or not, and for any other legal or equitable claims arising out of the transactions.

When this bill was before the Committees of Congress, the Committees gave full consideration to the decision of the Supreme Court in the case of *Goltra* v. *Weeks*, 271 U. S. 536. This case involved an injunction and the Committees were aware that the merits of the case had never been considered by the court. The Committees also had before them a letter from the Attorney General urging the passage of the bill so that the plaintiff could have his day in court on the merits of the case. The real question involved was whether the cancellation of plaintiff's two contracts by the Secretary of War on March 3, 1923, followed by the seizure of the fleet on March 25, 1923, under orders of the Acting Secretary of War, was within the terms of the contracts between the plaintiff and the defendant. The Court held that the "lessor" mentioned in the contract meant the Chief of Engineers and not the Secretary of War.

On May 28, 1919, plaintiff entered into a contract with William M. Black, Major General, Chief of Engineers, U. S.

Army, whereby the barges and towboats still under construction were leased to the plaintiff for a term of five years after delivery of the first unit, with an option to plaintiff to purchase the fleet and pay therefor in instalments over a period of fifteen years from the exercise of the option; the rental consisted of all net earnings made by the fleet and was to be credited on account of the purchase price of the fleet. As part of the transaction plaintiff released the United States from all claims which he had against them as a result of certain engagements made for World War purposes.

On May 26, 1921, a supplemental agreement was entered into between the parties by which the plaintiff agreed to furnish, subject to the defendant's approval, a certain tract of land and runway on which unloading facilities furnished by the lessor were to be erected. The unloading facilities were furnished by the lessor and erected on the land after the runways had been provided by the plaintiff.

On July 15, 1922, the defendant delivered the 19 barges and 4 towboats.

From the time of the delivery of the barges and towboats to the plaintiff, they were operated by the plaintiff as a common carrier until December 1, 1922, when they were placed in winter quarters with the approval and consent of the District Engineer, acting for and as the representative of the Chief of Engineers. It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923. During the time that plaintiff had possession of the fleet it was operated to the best advantage by him and plaintiff, as a common carrier, transported all the cargo offered that the barges were equipped to carry. There was no complaint or protest by the lessor of the operation of the fleet or the failure to accept cargo by the defendant.

On March 3, 1923, the Secretary of War transmitted to Colonel Ashburn, who was one of the officials of the Mississippi Warrior Service, which was a fleet of barges and towboats owned by the Government and operated on the Mississippi River, a letter addressed to plaintiff in which the Secretary of War stated that, pursuant to the right under paragraph eight of the original contract and the supple-

mental contract, in his judgment, the plaintiff had not operated the barges and towboats under the terms and conditions of the contract and had failed to operate them as a common carrier and declared the contract and the supplemental contract to be terminated. He requested the plaintiff to deliver the fleet and the unloading facilities to Colonel Ashburn. This letter was delivered by Colonel Ashburn to the plaintiff in Washington, D. C., during the afternoon of Sunday, March 4, 1923.

On March 8, 1923, plaintiff declined to comply with the demands of the Secretary of War complaining of the unjust interferences and restrictions which had been interposed and asserted that he had complied with every demand and requirement of the Chief of Engineers who was the lessor named in the contract.

On March 22, 1923, the Acting Secretary of War authorized Colonel Ashburn, as a representative of the United States, to take possession at once of all of the barges and towboats or any number that could be found. Colonel Ashburn, acting upon the above order went to St. Louis on March 25, 1923, and while plaintiff was absent took the fleet from the possession of the fleet's employees without their consent for the use and benefit of the United States. The nature of the seizure is best described by the United States District Engineer who wired the Chief of Engineers as follows:

> Col. Ashburn with the Federal Barge Line towboat *Vicksburg* and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *.

After the seizure a suit was commenced in plaintiff's behalf in the District Court of the United States against the Secretary of War, Colonel Ashburn, and the United States District Attorney. A temporary order was obtained and the barges were returned to the jurisdiction of the court and brought to St. Louis but they remained in the custody of the defendant until September 4, 1924.

After the hearing on the application for the injunction, the District Judge granted plaintiff's request and ordered the barges returned to him. At this trial a letter from the Chief of Engineers cancelling the contract was presented for the consideration of the court on behalf of the defendant. This letter is dated April 27, 1923, several months after the cancellation of the contract by the Secretary of War and more than a month after the seizure of the fleet by the acting Secretary of War.

The case was appealed to the Circuit Court which reversed the District Judge and the case was then taken to the Supreme Court of the United States.

On June 7, 1926, the Supreme Court affirmed the decision of the Circuit Court and the fleet was delivered to the defendant during June and September of that year. In its decision the Supreme Court held (271 U. S. 536, 548, 550):

> Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. * * *
>
> * * * The right of the lessor to take over the fleet under § 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor.

It will be seen that the decision of the Supreme Court was based on the assumption that the Chief of Engineers had exercised his judgment in a fair and impartial way and terminated the contract.

In the trial of the instant case it is shown that the Chief of Engineers did not exercise his own judgment but was coerced, after the Acting Secretary of War had seized the fleet, in signing the order cancelling the contract.

The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract. He testified that he did not exercise his own judgment but that, when

the letter was presented to him for his signature, he was forced to sign.

It is apparent from the record that the Chief of Engineers did not exercise his judgment in cancelling the lease before the cancellation of the contract by the Secretary of War and the subsequent seizure of the fleet by the Acting Secretary of War.

The cases are too numerous for citation that the plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and that he alone could act.

The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was *ultra vires*, and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. *Burton Coal Co.* v. *United States*, 60 C. cls. 294, affirmed 273 U. S. 337; *Williams Eng. & Cont. Co.* v. *United States*, 55 C. Cls. 349; *Michael H. King* v. *United States*, 37 C. Cls. 428; *Sun Shipbuilding Co.* v. *United States*, 76 C. Cls. 154; *Helvetia Milk Condensing Co.* v. *United States*, 74 C. Cls. 142 and *Lutz Co.* v. *United States*, 76 C. Cls. 405.

The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

Plaintiff only had a contract for a lease of the fleet for five years with an option to purchase. He attempted to exercise the option to purchase but the defendant refused to comply with the provision of the contract with reference to the appointment of arbitrators to fix the value which should be paid.

During the operation of the fleet from July 1922, to December 1, 1922, the plaintiff sustained a loss. This was a new service and large expenditures had to be made for prospective business, for providing land and runways, for costs incurred for advertising the service, insurance, and for repairs and changes in the towboats. Plaintiff was prohibited from charging less than the rail rate. The loss can be well understood.

It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained. *Sharp* v. *United States*, 191 U. S. 341, 348, 349; *Clarke* v. *Hot Springs Electric Light & Power Co.*, 55 Fed. (2d) 612; and *Sommers* v. *Commissioner of Internal Revenue*, 63 Fed. (2d) 551.

There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. Reproduction less depreciation or cost less depreciation are not fair bases on which to place valuation. Plaintiff is entitled to have taken into consideration what he spent in inaugurating the service and the cost of repairs and changes made to the towboats and the supplies furnished by him. Prospective profits can not be considered. No profits were made by the plaintiff during the time he had possession of the fleet from September 1924, to July 1926. This was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant.

As was said by Justice Butler in *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146, 156:

> It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.

As the plaintiff only possessed a lease with an option to purchase and there being no market value, it is necessary for the Court, in arriving at an amount sufficient to compensate him for injuries sustained, to take into consideration all outlays made by him including the rental value of his land, and make reasonable deduction for the less time engaged and for release from care, trouble, risk, and responsibility attending a full execution of the contract. *United States* v. *Speed*, 75 U. S. 77.

In *Hetzel* v. *Baltimore & Ohio Railroad Co.*, 169 U. S. 26, 37, 38, 39, the court said:

> * * * in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done.

The court quoted with approval from *Baker* v. *Drake*, 53 N. Y. 211, 220, as follows:

> The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about.

In *Hoffer Oil Corporation* v. *Carpenter*, 34 Fed. (2d) 589, 592, the court said:

> A person who has violated his contract will not be permitted to reap advantage from his own wrong, by insisting upon proof which, by reason of his breach, cannot be furnished. * * *
>
> A party, who has broken his contract, will not be permitted to escape liability because of the lack of a perfect measure of the damages caused by his breach. * * *
>
> A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient.

See *Eastman Kodak Co. of New York* v. *Southern Photo Materials Company*, 273 U. S. 359.

Taking all the relevant facts into consideration and after allowing the counterclaims, in making a jury award, the Court concludes that the sum of $350,000.00 is just compensation for the vessels and unloading apparatus and all

other claims, legal or equitable, arising out of the transactions.

Judgment is entered for the plaintiffs in the sum of $350,000.00, with interest at six percent per annum, not as interest but as a part of just compensation, from March 25, 1923, to the date of payment. *Virginia Engineering Company* v. *United States*, 89 C. Cls. 457.

It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge;* and WILLIAMS, *Judge*, took no part in the decision of this case.

COWDEN MANUFACTURING COMPANY v. THE UNITED STATES

[No. 44307. Decided April 1, 1940]*

On the Proofs

Processing taxes under Agricultural Adjustment Act; effective date; Government contract.—Where plaintiff on June 24, 1933, entered into a contract with the Government to supply certain articles of clothing, and on July 5, 1933, pursuant to a change order agreed to supply additional articles, and did supply such articles in accordance with said contract and change order; and where said contract contained a provision that the price agreed upon therein should be increased, or decreased, in accordance with any taxes, including processing taxes, upon the materials or supplies used in the manufacture of said articles, imposed by Congress after the date set for the opening of the bids, it is held that the processing taxes provided for in the Agricultural Adjustment Act, approved May 12, 1933, but not prescribed and proclaimed by the Secretary of Agriculture, in accordance with the authority conferred by the Act, until July 14, 1933, in a proclamation making said processing taxes effective August 1, 1933, were not taxes "heretofore imposed by the Congress," within the meaning and intent of said contract.

Same.—The Agricultural Adjustment Act, enacted prior to the date of the contract, did not definitely provide for any tax on the processing of cotton, nor did it specify the amount thereof, if such tax should be imposed, nor when such tax should become effective.

*Certiorari granted.

Same.—The action of Congress in imposing the processing tax under the Agricultural Adjustment Act was not complete until action by its delegate, the Secretary of Agriculture.

Same; "Federal Taxes provision" of contract.—The purpose of the "Federal Taxes provision" of the contract was to reimburse the contractor for its additional costs brought about by the defendant's act in levying additional taxes.

The Reporter's statement of the case:

Mr. Phil D. Morelock for the plaintiff. *Mr. George P. Lamb* was on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the basis of a stipulation of facts entered into between the parties:

1. Plaintiff is a corporation organized and existing under the laws of the State of Missouri, with its principal offices and place of business at 412 West 8th Street, Kansas City, Missouri.

2. Plaintiff entered into a contract, No. W-669-qm-4800 (O. I. 2538), with the United States through the proper purchasing officer of the Quartermaster Corps, at Philadelphia, Pennsylvania, on June 24, 1933, in which the plaintiff agreed to sell to the United States and deliver at the Quartermaster Depot in Philadelphia, Pennsylvania, 23,496 suits, mechanics type B-1 @ $1.90, for which the United States agreed to pay $44,642.40. Pursuant to a change order dated July 5, 1933, under and by virtue of the provisions of Article 7 of said contract, the total was increased upon written order from the contracting officer of the War Department, and the plaintiff was required to and did supply 11,724 additional suits, mechanics type B-1 @ $1.90, for which the United States agreed to pay $22,275.60. The total number of suits furnished under the contract was 35,220 at an aggregate price of $66,918, which suits were accepted and approved by defendant and said sum of $66,918 has heretofore been paid to plaintiff as by said contract provided.

3. The contract of June 24, 1933, was made pursuant to a bid submitted to the War Department by the plaintiff June 6, 1933. Both the bid and the contract contained the following provision:

> Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the government and entered on vouchers (or invoices) as separate items.

4. Plaintiff manufactured the suits involved in the aforesaid contract, and in the manufacture thereof it used 213,127¾ yards of cotton cloth which it purchased from McCampbell and Company, 320 Broadway, New York, selling agent for Graniteville Manufacturing Company of South Carolina, a first domestic processor of cotton.

The confirmation by McCampbell and Company of plaintiff's order, dated June 23, 1933, for the aforesaid cotton cloth contained the following provision:

> The prices stated herein are based upon present manufacturing conditions and cost thereunder. If such cost is increased by any Federal taxes or by the administration of the Industrial Recovery Act, the Agricultural Adjustment Act or by any Federal regulations or Federally approved codes and practices, affecting costs, not now in force, the amount of such increased cost shall be added to the prices stated and delivery shall be extended in proportion to any limitation of production caused thereby.

Pursuant to the above provision, McCampbell and Company billed plaintiff, as a separate item in its invoices for the above-mentioned cotton cloth, for the amount of tax applicable to the processing of the cotton from which said

cloth was manufactured, to-wit, the sum of $4,425.54, which amount plaintiff paid to McCampbell and Company. Processing taxes in the same amount were paid by Graniteville Manufacturing Company, the processor, to the Collector of Internal Revenue, which amount was included in larger amounts of processing taxes paid by said processor.

5. In manufacturing the aforesaid suits, plaintiff used 885⅖ units of cotton thread which it purchased from American Thread Company, a first domestic processor of cotton. The confirmation by American Thread Company of plaintiff's order, dated June 24, 1933, for said cotton thread, contained the following provision:

> In addition to the prices upon which this contract of sale is based, buyer agrees to pay any additional costs resulting from any sales tax or taxes and/or domestic allotment charges that may be imposed by the Federal, State and/or local government and applicable to any items on this contract at time of shipment.

Pursuant to the above provision, American Thread Company, a first domestic processor of cotton, billed plaintiff, as a separate item in its invoices for the above-mentioned cotton thread, for the amount of tax applicable to the processing of cotton from which said thread was manufactured, to-wit, the sum of $44.44, which amount plaintiff paid to American Thread Company. Processing taxes in the same amount were paid by American Thread Company, the processor, to the Collector of Internal Revenue, which amount was included in larger amounts of processing taxes paid by said processor.

6. Plaintiff duly made claim and demand against the United States, with the War Department, that the contract price for the mechanics suits be increased by the sum of $4,469.98, being the processing tax applicable to the processing of the cotton used in manufacturing and processing the supplies which plaintiff purchased and used, as aforesaid, to manufacture said mechanics suits.

The claim was referred, subsequently, to the Comptroller General of the United States, and was denied and rejected by said Comptroller General in his decision of August 11, 1936, A-68085.

7. The Secretary of Agriculture, in accordance with authority vested in him by the provisions of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended, for the purposes of said Act, prescribed that the first marketing year for cotton began August 1, 1933, and fixed the rate of tax at 4.2 cents per pound beginning August 1, 1933. The processing taxes of $4,469.98 were assessed and paid subsequent to the contracts entered into between the plaintiff and the War Department and subsequent to the agreements between the plaintiff and the processors.

8. Plaintiff is the sole owner of the claim sued upon, and has never transferred the same, or any part thereof, or any interest therein, and no action other than herein stated has been had on said claim through Congress, or in any of the Departments of the Government.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant on June 24, 1933, to furnish a certain number of suits of a certain type for a specified price. The contract entered into contained the following provision, known as the "Federal Taxes" provision:

> Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the government and entered on vouchers (or invoices) as separate items.

In order to carry out its contract the plaintiff purchased cotton cloth and cotton thread at a certain price, plus the amount of any taxes levied by the Industrial Recovery Act, the Agricultural Adjustment Act, and others. After the

purchase of the cloth and thread the vendors thereof paid processing taxes thereon in the total amount of $4,469.98, for which amount they were reimbursed by the plaintiff. The plaintiff then made demand on the defendant for an additional payment to it of this amount under the "Federal Taxes" provision of its contract. The claim was denied and this suit was brought.

The defendant defends on the ground that the Agricultural Adjustment Act was passed prior to the date of plaintiff's contract and, therefore, under the "Federal Taxes" provision of the contract plaintiff is not entitled to any additional payment on account of the taxes levied by that Act. That provision recites that the prices set forth therein include any Federal tax "heretofore imposed by the Congress," but the defendant agreed to pay an additional sum to the contractor in case any processing tax, among others, is "imposed or changed by the Congress *after* the date set for the opening of the bid upon which this contract is based." (Italics ours.)

While the Agricultural Adjustment Act was passed prior to the date of the contract, it did not definitely provide for any tax on the processing of cotton, nor did it specify the amount thereof, if one should be imposed, nor when it should become effective. Its provisions with respect to a processing tax on cotton are as follows:

In section 2 (1) Congress declared that it was its purpose in passing the Act, among others,

> To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period.

In section 8 the Secretary of Agriculture is given power, in order to effectuate the declared policy, to provide, among other things, for reduction in the acreage of any basic agricultural commodity, and "to provide for rental or benefit payments in connection therewith * * * in such amounts as the Secretary deems fair and reasonable."

In section 9 (a) it is provided:

> When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. * * * The rate of tax shall conform to the requirements of subsection (b).

In subsection (b) it is provided:

> The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; * * *

unless the Secretary concludes that the tax at such rate would cause an accumulation of surplus stocks or a depression of the farm price of the commodity, in which event it is provided that "the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity."

From the foregoing quotations from the Act it is obvious that with respect to cotton, for instance, it was unknown after the passage of the Act whether or not there would be any processing tax with respect thereto. Whether or not there should be was dependent upon the future action of the Secretary of Agriculture. No processing tax on cotton became effective until the Secretary had determined that rental or benefit payments should be made with respect thereto. Whether or not he would ever make such determination was unknown, although it might reasonably have been anticipated. But even so, it was impossible to determine from the Act when the tax should become effective, since it would not become effective until the beginning of the marketing year after such determination of the Secretary. The plaintiff, therefore, did not know when it entered into its contract whether or not it would have to pay any processing taxes.

Nor could the rate of the tax be determined from the Act. The Act authorized the Secretary of Agriculture to determine the rate at such amount as would equalize the current average farm price of the commodity and the fair exchange value of

the commodity. The plaintiff manifestly was unable to tell therefrom what rate the Secretary would fix. Moreover, the Secretary was not bound by this formula if he believed that its application would result in an accumulation of surplus stocks of the commodity or in the depression of its price. In this event he was authorized to fix a different rate, one that would prevent such accumulation of stocks or depression of price.

Even after the rate had been fixed by the Secretary, he had the right under the Act to vary it from time to time if he found this necessary in order to effectuate the declared purpose of Congress in passing the Act.

It is manifest, therefore, that it was impossible for either the plaintiff or its vendors to have determined the amount of the tax which it would be necessary to pay.

Under such circumstances we cannot say that these taxes had been "imposed" prior to the date of plaintiff's contract with the defendant, within the meaning in which that word was used in the contract. Authority had been conferred by Congress for the imposition of the tax, but that authority had not been exercised until thereafter, to-wit, on July 14, 1933. The purpose of the Federal Taxes provision of the contract was to reimburse the contractor for its additional costs brought about by the defendant's act in levying additional taxes. The taxes were not in effect when the contract was made and it was impossible for the contractor to ascertain when they would go into effect or the amount of them when they did. Therefore it could not figure what to include in its costs on account of them.

We are, therefore, of opinion that the processing taxes paid by the plaintiff were taxes "imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based." The action of Congress in imposing the tax was not complete until action by its delegate, the Secretary of Agriculture, and this was after the contract was made.

All other questions raised by the defendant have been disposed of by our decisions in *Batavia Mills, Inc.*, v. *The United*

States, 85 C. Cls., 447, and *The Telescope Folding Furniture Company, Inc.*, v. *The United States*, 90 C. Cls. 635.

It results that plaintiff is entitled to recover of the defendant the sum of $4,469.98. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

FIRST NATIONAL PICTURES, INC., v. THE UNITED STATES

[No. 44773. Decided April 1, 1940]

On Demurrer

Capital stock tax; suit on second rejected claim after failure to sue on first claim rejected.—Where an insufficient claim for refund of capital stock tax was rejected by the Commissioner of Internal Revenue and suit for recovery was not brought thereon within the limitations of bringing suit after rejection, it is held that this does not prevent the filing of a different claim, which is sufficient, within the period in which such claims may be filed and bringing a suit within the statutory period after rejection of said second claim. The *Altman case*, 69 C. Cls., 721, distinguished.

Same.—Where the first claim for refund of capital stock tax was based on the theory that the taxpayer had transferred its assets and liabilities in return for the surrender of all its capital stock and that taxpayer at the close of the taxable year had no assets or liabilities and was in process of dissolution, and where the second claim was based on the theory that in determining the taxability of plaintiff for the year in question the taxpayer should be given credit for the value of property distributed to shareholders in liquidation, which value is stated at an amount equaling the declared value of its capital stock with statutory additions, and thereby the "adjusted declared value" is reduced to nothing, it is held that the two claims can not be regarded as one and the same, although they ask for the same amount of refund.

Same; declared value and actual value.—The capital stock tax is applied to the first year on the basis of the declared value of the stock which is fixed by the taxpayer and may or may not be its real value.

Same.—Section 701 (f) of the Revenue Act of 1934 allows a deduction for "the value of property distributed in liquidation to shareholders" but this is the *actual value* of the property so distributed and it can not be measured in accordance with the "declared value," which "declared value" being purely elective furnishes no method of determining the actual value, and taxpayer is not permitted to fix the "adjusted declared value" in this manner.

The Reporter's statement of the case:

Mr. Lawrence A. Baker for the plaintiff. *Messrs. John A. Selby, Henry Ravenel,* and *Henry H. Elliott* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge,* delivered the opinion of the court:

The facts material to the decision on the demurrer, as shown by the petition, are that the plaintiff for the fiscal year 1934 filed a capital-stock-tax return declaring the value of its capital stock as $21,000,000. For 1935, it filed a return purporting to comply with section 701 of the revenue act of 1934 (48 Stat. 680, 769) showing an adjusted declared value of $23,577,000. The plaintiff was on a fiscal basis for income-tax purposes with the year ending August 31. The 1934 return purported to show the value as of August 31, 1933, and the value stated in the 1935 return was as of August 31, 1934.

On August 24, 1934, the plaintiff's stock was owned by Warner Bros. Pictures, Inc., a Delaware corporation, and on that date all the assets and properties of the plaintiff of every description were conveyed to Warner Bros. Pictures, Inc., in exchange for all the capital stock of plaintiff. The capital-stock tax reported to be due on the return for the fiscal year 1934, namely, $23,577, was paid by Warner Bros. Pictures, Inc., on July 30, 1935, in the name of and in behalf of the plaintiff, believing it to be a liability of plaintiff which was assumed by Warner Bros. Pictures as a part of the agreement of the transfer of the assets.

On October 29, 1935, the plaintiff filed an amended return for the taxable year 1935 reporting the value of its capital stock as "None"; and on the same date filed a claim for refund of the capital-stock tax paid. The basis of the claim was that plaintiff, prior to the close of its income tax fiscal year, had transferred all its assets to its stockholders and that plaintiff had no assets or liabilities and was in process of dissolution. The claim was rejected on July 14, 1936, for lack of evidence of the fair market value of the property distributed in liquidation to stockholders. On November 23, 1938, plaintiff filed another claim for refund of $23,577 paid for the taxable year ending June 30, 1935, stating that its claim should be allowed for the following reasons:

> Prior to August 31, 1934, the close of the last income-tax taxable year of the claimant ended prior to the close of the capital-stock-tax taxable year ended June 30, 1935, claimant distributed in liquidation to shareholders property of a value within the meaning of Section 701 (f) (A) of the Revenue Act of 1934 of, to wit, $23,577,213.18.
>
> In filing its capital-stock-tax return for the capital-stock-tax taxable year ended June 30, 1935, claimant erroneously failed to decrease the original declared value as adjusted of its capital stock by the value of property distributed in liquidation, which adjustment is required by Section 701 (f) (A) of the Revenue Act of 1934.

This second claim was rejected by the Commissioner on the ground that it was no more than a duplication of the claim filed on October 29, 1935, and rejected on July 14, 1936, and that the two-year period for filing suit had expired before the second claim was filed.

Defendant's demurrer is based on the premise that the claim for refund filed November 23, 1938, was the same as the claim filed October 29, 1935, and rejected July 14, 1936, and that under the decision of this court in *B. Altman & Co.* v. *United States*, 69 C. Cls. 721, the two-year period of limitation for filing suit expired July 14, 1938. This suit was not commenced until July 29, 1939.

We do not think the two claims can be regarded as one and the same, although they ask for the same amount of

refund. They were based on altogether different theories and were supported by different facts. In other words, the grounds of the two claims were quite different. The first claim was insufficient because, as hereinafter shown, it did not conform to the statute or the regulations, while there is no contention that the second claim is not valid in form. The basis of the first claim is that the taxpayer had transferred its assets and liabilities in return for the surrender of all its capital stock and that at the close of the taxable year had no assets or liabilities and was in process of dissolution. This, as we will show hereinafter, is not sufficient to establish plaintiff's right to a refund.

The basis of the second claim is that in determining the taxability of the plaintiff the taxpayer should be given credit for the value of property distributed in liquidation to shareholders which is stated at an amount equaling the declared value with statutory additions and which would make the "adjusted declared value" nothing.

The insufficiency of the first claim will appear from an examination of the statute which makes the "adjusted declared value" the controlling factor in determining the tax after the first year.

The tax is applied to the first year on the basis of the declared value of the stock which is fixed by the taxpayer and may or may not be its real value. Usually it is not. After the first year, as the law then stood, the tax is determined in accordance with what was denominated in the statute (section 701 (f) of the revenue act of 1934) the "adjusted declared value" which again may or may not be the real value, and this "adjusted declared value" must be determined in accordance with the statute. Having once elected and fixed the declared value, the taxpayer must adhere to it and can have it reduced only in the manner provided in the statute. Section 701 of the act referred to provides for a reduction from the original declared value by the value of property distributed in liquidation. The first claim does not allege as a ground therefor that the property of the corporation had been distributed in liquidation as required by the statute, and if it can be said to be supplemented in that respect by the amended return, that

return is also insufficient to comply with the statute. Section 701 (f) of the revenue act of 1934, to which we have referred above, allows a deduction for "the value of property distributed in liquidation to shareholders," but this is the *actual* value of the property so distributed and it cannot be measured in accordance with the "declared value" as stated in the amended return, for the declared value being purely elective furnishes no method of determining the actual value and the taxpayer is not permitted to fix the "adjusted declared value" in this manner. The "adjusted declared value" therefore does not appear in the first claim. The Commissioner could, if he saw fit, waive this defect to the extent of permitting the taxpayer to show the actual value of the property distributed and if this actual value had been shown it might be argued that the defective statement in the claim had been properly supplemented. But, as shown by exhibits attached to the petition, the plaintiff refused to offer any evidence of actual value and the claim as it was filed did not comply with the statutory requirements.

The first claim asserted that the plaintiff had transferred to its stockholders all its assets and liabilities in consideration of the surrender to the plaintiff of all its capital stock but it did not definitely show that this transfer had been made in liquidation to the shareholders and it made no statement whatever as to the actual value of the property transferred as required by the statute in order to properly obtain the "adjusted declared value" without which the taxability of plaintiff could not be determined. For the reasons set out above, we conclude that the first claim was insufficient.

We have therefore a case in which an insufficient claim was rejected on the ground above stated and suit not brought thereon within the limitations of bringing a suit after a rejection. This fact, in our opinion, does not prevent the filing of a different claim which is sufficient, within the period in which such claims may be filed and bringing a suit within the statutory period after its rejection—all of which, in our opinion, the plaintiff has done.

The second claim is not as definite as it might be, but it sets out facts which show that the value of the property distributed in liquidation to shareholders equals the amount of the original declared value of the capital stock together with statutory additions thereto as shown by the amended return and that the "adjusted declared value" was therefore nothing. As before stated, neither the Commissioner nor counsel for defendant has contended that the second claim was insufficient. Their sole ground for its rejection is that it was in substance and effect the same as the first claim. With this contention we do not agree.

The *Altman case*, *supra*, which is discussed in argument by counsel, merely held that when a claim for refund has been filed and disallowed, the time for bringing suit after the disallowance thereof will not be extended by filing another claim exactly the same as the first in substance and effect. As we have held in this case that the two claims involved were not the same, the decision has no application here.

The demurrer must be overruled, and it is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

HENRY M. BUTLER v. THE UNITED STATES

[No. 43917. Decided April 1, 1940]

On the Proofs

Pay and allowances; date of retirement of Navy officer.—Decided upon the authority of *James A. Greenwald, Jr.* v. *The United States*, 88 C. Cls. 264, in which it was held that an officer is retired as of the date fixed in the President's order.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On July 3, 1905, plaintiff was appointed a midshipman in the United States Navy; he resigned therefrom on February 13, 1907; and on March 7, 1908, he accepted appointment as a second lieutenant, United States Marine Corps.

2. Plaintiff was promoted to first lieutenant, U. S. Marine Corps on March 8, 1911, with rank from February 5, 1911; he was promoted to captain on April 26, 1917, with rank from August 29, 1916; and he was promoted to major January 11, 1923, with rank from June 4, 1920.

3. Plaintiff served continuously on active duty from July 3, 1905, to February 13, 1907, and from March 7, 1908, until August 1, 1936, when he was retired on account of incapacity, the result of an incident of the service.

4. On May 11, 1936, pursuant to orders of the Secretary of the Navy, plaintiff appeared before a naval retiring board. It found that he was incapacitated for active service by reason of (1) arterial hypertension, and (2) nephritis, chronic, and that his incapacity was permanent and was the result of an incident of the service.

5. On May 26, 1936, the Acting Secretary of the Navy forwarded the findings of the retiring board to the President, with recommendation that they be approved, and that, on August 1, 1936, plaintiff be retired from active service, and be placed on the retired list, in conformity with the provisions of the U. S. Code, Title 34, Section 417.

6. On May 27, 1936, the President approved the findings of the retiring board, and the recommendation of the Secretary of the Navy.

7. On July 10, 1936, the Major General Commandant of the Marine Corps advised the plaintiff as follows:

> 1. The Naval Retiring Board, Marine Barracks, Washington, D. C., before which you appeared on May 11, 1936, found you incapacitated for active service and that your incapacity is permanent and the result of an incident of the service.
>
> 2. The President of the United States, on May 27, 1936, approved the finding of the board and directed that you be retired from active service and placed on the retired list, in conformity with the provisions of the U. S. Code, Title 34, Section 417, on August 1, 1936.

3. Accordingly, you will be transferred to the retired list of officers of the Marine Corps on August 1, 1936, with the rank of Major.

4. The Major General Commandant regrets that physical disability necessitates your separation from the active list of the Marine Corps and wishes you many years of happiness and prosperity.

8. On August 1, 1936, plaintiff was credited with thirty years' and five days' service for pay purposes.

9. If it is held that plaintiff was transferred to the retired list on August 1, 1936, he is entitled to recover the difference between the retired pay of a major with more than 30 years' service for pay purposes and the pay of a major with less than 30 years' service from August 1, 1936. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM:

There is no dispute about the facts in the case as set forth in the findings. The plaintiff is a Marine officer who was found by a naval retiring board to be incapacitated for active service. The Secretary of the Navy presented the findings to the President with the recommendation that they be approved and that on August 1, 1936, the plaintiff be retired from active service and placed on the retired list. On May 27, 1936, the President approved the findings of the retiring board and the recommendation of the Secretary of the Navy. The only question presented in the case is whether the plaintiff was retired on August 1, 1936, the date upon which the President directed he should be transferred to the retired list; or upon May 27, 1936, the date upon which the President affixed his signature to the approval of the decision of the retiring board.

If it is held that the plaintiff was transferred to the retired list on August 1, 1936, he is entitled to recover the difference between the retired pay of a major with more than 30 years' service for pay purposes and the pay of a major with less than 30 years' service.

The case is identical in principle with that of *James A. Greenwald, Jr.* v. *United States*, 88 C. Cls. 264, and is con-

Syllabus

trolled by the decision made therein. Under the holding in the case cited the plantiff was retired on August 1, 1936, the date on which the President directed he should be transferred to the retired list and judgment should be rendered for the plaintiff accordingly. The claim, however, is a continuing one and entry of judgment will be suspended pending receipt of a computation by the General Accounting Office of the amount due the plaintiff in accordance with this opinion.

In accordance with the above decision, and on report from the General Accounting Office, the Court on June 3, 1940, rendered judgment for the plaintiff in the sum of $481.72.

BYRON BROWN RALSTON v. THE UNITED STATES

[No. 43643. Decided April 1, 1940]*

On the Proofs

Pay and allowances; right of retired Navy officer to allowances under special act.—Where plaintiff, an engineer officer in the United States Navy, resigned from the service on January 31, 1927, on account of physical disability, but by a special act of Congress, approved May 14, 1928, he was reappointed to his former rank and placed on the "retired list of the Navy with the retired pay *and allowance* of that grade," in accordance with the provisions of said act, from the 14th day of May, 1928, it is held that he is entitled to recover the rental and subsistence allowances of a retired officer of his rank, with dependents, from August 1, 1931. *Sweeney* v. *The United States*, 82 C. Cls. 640, held to be controlling.

Same; purpose of special act.—The purpose of a special act is to make an exception from the general rule and confer upon the individual referred to therein a special favor exempting him from general statutes and rules.

Same; failure to appropriate.—Where the right of compensation exists the failure of Congress to make an appropriation therefor will not of itself deny the right.

Same; "allowance" and "allowances."—The use of the word "allowance" in the special act instead of "allowances" is immaterial.

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*Certiorari denied.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Mr. John W. Gaskins* and *King & King* were on the briefs.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. Byron Brown Ralston, plaintiff, a resident of Pelham, New York, is a retired lieutenant commander of the United States Navy. On May 7, 1910, he was appointed a midshipman; on June 5, 1914, he graduated from the United States Naval Academy; on June 6, 1914, he was commissioned an ensign, and served in the United States Navy until April 15, 1927.

On December 23, 1924, he was commissioned a lieutenant commander, which commission he held until April 15, 1927, the date when his resignation was accepted.

2. On April 5, 1917, plaintiff was operated on in the Naval Hospital, Washington, D. C., for double direct inguinal hernia. At the end of three weeks he returned to active sea duty, since his operating surgeon advised him that his "condition would not recur."

Plaintiff was an engineer officer. His duties included repairs to engines and boilers, inspecting and crawling through boilers, and related work of a rather strenuous nature. On several occasions while so working he complained to the medical authorities but continued his work without further medical care.

3. Plaintiff was unsuccessful in his efforts to get a change of duty which would relieve him of the engineering work. He submitted to a physical examination and was pronounced fit, whereupon he decided to change his occupation. On January 31, 1927, he submitted his resignation from the service.

On February 25, 1927, he reported to the Bremerton Navy Yard, State of Washington, for a physical examination before he was released from the service. It was then found that he

had a recurrent hernia. At the time he submitted his resignation he did not know that he suffered from the recurring double hernia. The acceptance of his resignation was withheld after the physical examination and he was permitted to proceed to the Brooklyn Naval Hospital, where his condition was confirmed but an operation was discouraged. On March 30, 1927, a board of medical survey convened, found the hernia to exist, but recommended plaintiff be returned to active duty.

On April 15, 1927, plaintiff's resignation was accepted, at which time he protested to the Navy Department that he should be ordered before a retiring board because of the recently discovered physical disability.

4. On May 14, 1928, the following act of Congress was approved (45 Stat. 1830):

> That the President is authorized to appoint Byron Brown Ralston, formerly lieutenant commander in the United States Navy, a lieutenant commander in the United States Navy and place him upon the retired list of the Navy with the retired pay and allowance of that grade with credit for any purposes for all service to which he was entitled on April 15, 1927: *Provided*, That a duly constituted naval retiring board finds that the said Byron Brown Ralston incurred physical disability incident to the service while on the active list of the navy: *Provided further*, That no back pay, allowance, or emoluments shall become due as a result of the passage of this Act.

5. Plaintiff appeared before a Naval Retirement Board, which found him to be so disabled. On July 16, 1928, the Secretary of the Navy wrote plaintiff, his letter reading in part as follows:

> You are advised that you have been, by direction of the President of the United States, placed on the Retired List of the Navy as a Lieutenant Commander, from the 14th day of May 1928, with retired pay and allowances of that grade, in accordance with the provisions of the Act of 14 May 1928.

6. Since the approval of the above congressional act plaintiff has been on the rolls of the retired list of the Navy,

Third Naval District, and has received three-quarters of his active duty pay in the rank of lieutenant commander. However, plaintiff has not received subsistence or rental allowances although his wife, mother, and one minor daughter have been living with and dependent on plaintiff since his retirement.

7. After his retirement the plaintiff discussed the matter of allowances with his paymasters and was told by them that it would do no good to present such a claim as is involved in this suit, and he filed none until August 31, 1937, when his petition in the instant case was presented to this court. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This suit is begun by an officer retired by a special act to recover the rental and subsistence allowances of his rank, with dependents, from August 1, 1931.

There is no disagreement between the parties as to the service of the plaintiff which is set forth in the findings, nor is there any dispute as to the circumstances of his retirement. It appears that the plaintiff had presented his resignation. A physical examination being ordered after some proceedings not material to the controversy in the case, the plaintiff was ordered before a retiring board because of a recently discovered physical disability.

On May 14, 1928, the following Act of Congress was approved (45 Stat. 1830):

> That the President is authorized to appoint Byron Brown Ralston, formerly lieutenant commander in the United States Navy, a lieutenant commander in the United States Navy and place him upon the retired list of the Navy with the retired pay and allowance of that grade with credit for any purposes for all service to which he was entitled on April 15, 1927: *Provided*, That a duly constituted naval retiring board finds that the said Byron Brown Ralston incurred physical disability incident to the service while on the active list of the navy: *Provided further*, That no back pay, allow-

ance, or emoluments shall become due as a result of the passage of this Act.

Plaintiff appeared before a Naval Retirement Board which found him to be so disabled. Pursuant to that finding and the act above recited, the Secretary of the Navy placed plaintiff on the retired list as a lieutenant commander from May 14, 1928, with the retired pay and allowances of that grade in accordance with the provisions of the Act of May 14, 1928, above set out.

Since the approval of the act, plaintiff has received three-fourths of his active duty pay in the rank of lieutenant commander, with dependents, but has not received the allowances of his grade.

The question presented in the case is whether, under the Act of Congress set out above, the plaintiff is entitled not only to retired pay of the grade of lieutenant commander but also to the allowance for that grade as stated in the act.

The case of *Sweeney* v. *United States*, 82 C. Cls. 640, is exactly similar to the one before us, except that in the *Sweeney case* the word "allowances" was used in the special act instead of "allowance" as in the case at bar. This we deem immaterial and think the decision in the *Sweeney case* is controlling. See also *Shacklette* v. *United States*, 71 C. Cls. 376. The opinion in the *Sweeney case* elaborately reviewed the language of the act, held it to be clear and explicit, and said:

> We must take the act as it is written, without addition or diminution, * * *.

For this holding it gave thorough and complete reasons which are not in any way refuted by the argument of counsel. This reasoning so fully supports a judgment of the court in favor of the plaintiff as to make it seem superfluous to add anything thereto.

It may, however, be noted that the argument on the part of the defense is in effect that it was not intended by Congress by special act to grant allowances to plaintiff, that this is shown by the fact that the general law does not provide for retired officers receiving allowances, and that the granting

thereof to plaintiff would be an unjust discrimination in his favor for which no good reason can be given. There may be cases where it is manifest from the circumstances thereof that Congress could not have intended that the act in question should be applied literally, but this conclusion cannot be drawn when considering a special act like the one now before us. The very purpose of an act of this kind is to make an exception from the general rule and confer upon the individual referred to in the act a special favor exempting him from general statutes and general rules. Congress is not obliged to give its reasons for so doing, nor is the individual benefited by the act required to show that there was good reason for the passage of it. If Congress saw fit by clear and explicit language to confer a special benefit on the plaintiff it was within its power to do so, whatever the reasons may have been and even though some unreasonable discrimination may have been created.

It is also urged that no appropriation was made by Congress to pay the allowance provided in the act under consideration, but we have often held that where the right of compensation exists the failure to make an appropriation therefor will not in itself deny the right.

The plaintiff is entitled to recover the allowance claimed for a period beginning six years prior to the time of filing the petition herein which was August 31, 1937. The case, however, is a continuing one and entry of judgment will be suspended pending the receipt from the General Accounting Office of a statement of the amount due plaintiff in accordance with this opinion. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge;* and WILLIAMS, *Judge*, took no part in the decision of this case.

In accordance with the above decision, and on report from the General Accounting Office, the Court on June 3, 1940, rendered judgment for the plaintiff in the sum of $15,414.89.

Syllabus

THE CHIPPEWA INDIANS OF MINNESOTA v. THE UNITED STATES

[No. M-135. Decided April 1, 1940]

On the Proofs

Indian claims; incorrect appraisals of timber lands.—Where the facts disclose that the defendant, acting through its duly authorized representative, the Secretary of the Interior, selected and appointed to make a cruise of timber lands belonging to plaintiffs examiners who were inexperienced and incompetent, and where the examinations and estimates made by such inexperienced and incompetent examiners were not checked and verified by a foreman who was experienced and competent, and where said timber was sold on the basis of such estimates so made, it is held that the acts of the defendant through its authorized officer constituted a violation of the terms and provisions of the Act of January 14, 1889, which act required that the examination of such lands of plaintiffs should be "careful, complete, and thorough" and should be made by "a sufficient number of competent and experienced examiners," and that plaintiffs are accordingly entitled to recover for the loss sustained in the sale of said timber on the basis of said incorrect appraisals thereof.

Same; expenses of incorrect appraisals.—Where the timber of plaintiffs was sold on the basis of incorrect estimates made by inexperienced and incompetent examiners, in violation of the act making provision for such examination and appraisal, it is held that plaintiffs are entitled to recover for the amount expended for such inaccurate and incorrect estimates, which amount for such expenses was reimbursed to defendant out of funds belonging to plaintiffs.

Same; jurisdiction determined by statute.—Where it is established that certain officers of the defendant may have acted carelessly and negligently in the selection and appointment of examiners who examined and estimated certain of plaintiffs' timber lands, resulting in loss to plaintiffs in the sale of said timber, it is held that the statute or agreement which grants the right upon which plaintiffs' claim is based determines the question of jurisdiction rather than the conduct of the defendant's authorized agents which constituted the breach.

Same.—The fact that the actions which constituted the breach of duty, or of the agreement, were aggravated does not affect the right of plaintiffs to maintain and recover on the claim arising out of the statute or agreement.

Same; calculation of damages.—Damages are not rendered uncertain because they can not be calculated with exactness and it is sufficient if a reasonable basis of computation is afforded.

Same; payment under treaty obligation.—Where a payment made to plaintiffs was clearly a payment pursuant to an obligation assumed by defendant under the provisions of a treaty, such payment can not be allowed as an offset.

Same; payment made and appropriated by Congress after enactment of jurisdictional act.—Where a payment was made to plaintiffs as compensation which Congress determined to be due plaintiffs for obligations assumed by the United States under previous treaties and where the determination and allowance of the amount of said payment, and the appropriation therefor, were made after the jurisdictional act was enacted, it is held that such amount so allowed and paid by Congress can not be treated as a gratuity, and allowed as an offset under the provisions of the jurisdictional act.

Same; Indian policy of Government; gratuities.—Where it is contended that certain expenditures, made not pursuant to any specific obligation under treaty or agreements, were not solely for the benefit of the Indians but were made pursuant to the established Indian policy of the Government and therefore should not be allowed as offsets for gratuitous expenditures under the provisions of the jurisdictional act, it is held that under the decisions in the *Blackfeet* case and other cases cited any amounts expended from public funds for the benefit of the Indians in maintaining and carrying out the Government's Indian policy, as determined by Congress, without obligation for such expenditures under any treaty or agreement, are gratuities which must be allowed as offsets under the provisions of said jurisdictional act.

Same.—The question of governmental policy in relation to Indian affairs is a matter for Congress to determine.

The Reporter's statement of the case:

Mr. Donald S. Holmes for the plaintiffs. *Mr. Webster Ballinger* and *Baldwin, Holmes, Mayall & Reavill* were on the brief.

Mr. Walter C. Shoup, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

In this case plaintiffs seek to recover loss and damage with interest in the total amount of $1,277,800.74. Of this total, the amount of $340,061.66 represents the loss and damage

alleged to have been sustained in July 1896 by reason of the sale by the defendant of certain of plaintiffs' timber lands for an amount which was far less than the market value of the timber actually standing thereon, by reason of incorrect, careless, and incompetent examinations and estimates of such timber in violation of sections 4 and 5 of the act of January 14, 1889, and agreements with plaintiffs; and $79,-597.12 represents the amount for which the defendant reimbursed itself in May 1911 out of plaintiffs' funds for the cost of having the incorrect and incompetent examinations and estimates made of 115,342.78 acres of plaintiffs' timber land. The balance of $858,141.96 represents interest at 5 percent per annum provided for under section 4 of the jurisdictional act on the aforementioned items of loss and damage.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs, the Chippewa Indians of Minnesota, constitute the class designated and described in the act of January 14, 1889 (25 Stat. 642), as "all of the Chippewa Indians of Minnesota," and the class authorized by the jurisdictional act to maintain suits as therein provided. On and long prior to the act approved January 14, 1889, the Chippewas in Minnesota resided on twelve reservations in that state. One of these twelve reservations comprising approximately 3,200,000 acres lying and situate around upper and lower Red Lakes in the northwestern part of Minnesota was known as the Red Lake Reservation and included the Pine lands involved in this suit.

2. Section 1 of the act of January 14, 1889, entitled "An Act for the Relief and Civilization of the Chippewa Indians in Minnesota," provided, so far as material here, as follows:

> That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and

to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; * * * and provided that all agreements therefor shall be approved by the President of the United States before taking effect.

Sections 4 and 5 of this act are as follows:

SEC. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field-notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed 'pine lands,' the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not

be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes, surveys, and minutes of examinations shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservation other than pine lands are for the purposes of this act termed "agricultural lands."

SEC. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions

> containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

Section 7 provided that all moneys accruing from the disposition of such lands in conformity with the provisions of the act after deducting all the expenses of making the census, obtaining the cession and relinquishment, in making the removal and allotments, and of completing the surveys and appraisals, in the act provided, should be placed in the Treasury of the United States to the credit of all the Chippewa Indians of the State of Minnesota as a permanent fund which should draw interest at the rate of 5 percent per annum, payable annually for a period of fifty years.

The commission provided for in section 1 of the act was appointed by the President and that commission met with the various bands or tribe of Indians in Minnesota, held numerous council meetings with them at various reservations, prepared census rolls as in the act provided, and after such negotiations, entered into agreements with all of the Indians, which agreements were duly signed and executed by the commissioners and the Indians as in such act provided. These agreements embodied, among other things, all the terms and conditions of the act of 1889, *supra*, which the United States, so far as it was obligated to do so, solemnly promised and agreed to carry out. These agreements were submitted to and were accepted and approved by the President, March 4, 1890.

3. After the cession and relinquishment of the Indian title had been thus obtained, accepted and approved, all as provided in such act and the agreements entered into thereunder, the Commissioner of the General Land Office caused the land so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and, as such surveys were completed, the reports, field notes, and plats of the land were filed in the General Land Office and

were duly approved by the commissioner thereof, all as provided in Section 4 of the Act of January 14, 1889, and the then Secretary of the Interior, pursuant to the authority and direction contained in Section 4, appointed divers persons to act as examiners to examine the lands by 40-acre tracts or lots for the purpose of ascertaining on which lots or tracts there was standing pine timber, and the amount of such pine timber estimated by feet in the manner usual in estimating pine timber. Thereafter, and in the calendar year 1891, the persons so appointed undertook the work of making such examination of the lands so surveyed on those portions of the White Earth and Red Lake Reservations not reserved for the purpose of allotment. Thereafter, estimates and reports of the results of their examinations upon these lands were filed with the Commissioner of the General Land Office, who thereupon caused to be made a list of all lands upon which, from such estimates and reports, there appeared to be standing pine timber, and were classified the same as "pine lands" under the act and agreements describing each 40-acre lot or tract thereof separately, and setting opposite each such description, as the appraised cash value of such land and the timber thereon, an amount equal to the value of the pine timber shown to be upon each such tract by the estimates and reports at the rate and price of $3 a thousand feet board measure, which was the minimum value fixed by the act and agreements, save that in those few instances where the quantity of timber was so small as to amount to less than $1.25 an acre for the tract involved, a valuation equal to $1.25 an acre was adopted. The work of examining, classifying, estimating, and appraising lands ceded under the act and agreements commenced during the year 1891 on the White Earth and Red Lake Reservations, and continued thereafter, with occasional interruptions, until late in 1896, when such work was suspended and the examiners previously appointed discharged, as hereinafter set forth.

4. In the agreements with plaintiffs and in section 4 of the act of January 14, 1889, as embodied in the agreements, the United States expressly promised and agreed that "com-

petent and experienced examiners" would be appointed to examine and estimate the pine timber upon plaintiffs' lands, but defendant and its then Secretary of the Interior, who was duly authorized to act for the defendant, failed to carry out the agreements and the provisions of section 4 in that regard. A large majority of the persons so appointed as such examiners by the then Secretary of the Interior, and who made the examinations, reports, and estimates as to the pine lands, certain of which were thereafter sold as hereinafter described, was incompetent and without proper experience in estimating the quantity or quality of the pine timber on plaintiffs' lands. The fact of such lack of experience and qualification on the part of the persons so appointed as examiners, as aforesaid, was known to the defendant through its Secretary of the Interior and other authorized officers and agents. However, the Secretary of the Interior, who was duly authorized and charged by the defendant to act for and on its behalf in that regard, appointed and maintained such incompetent and inexperienced examiners throughout the period from their appointment until such examiners had completed their examinations, estimates, and reports prepared by them with respect to 115,342.78 acres of plaintiffs' lands classified as "pine lands." In August 1896, after the 115,342.78 acres of timber lands had been examined and reported upon by the examiners aforesaid and after 65,038.33 acres thereof had been sold at public and private sale on the basis of such examinations and reports, the then Secretary of the Interior resigned, and the incoming Secretary of the Interior promptly discharged all the examiners theretofore appointed by his predecessor and ordered an investigation and reexamination of the timber land sold and unsold, as hereinafter more fully set forth.

5. By an act approved February 26, 1896, 29 Stat. 17, section 5 of the act of January 14, 1889, *supra*, was amended so as to make the first part of that section read as follows:

> "That whenever, and as often as the survey, examination, and appraisal of one hundred thousand acres of

> said pine lands, or of a less quantity, in the discretion of the Secretary of the Interior, have been made, the portion so surveyed, examined, and appraised shall be proclaimed as in market and offered for sale in the following manner: * * *."

The last part of the section was amended so as to provide "that sections numbered sixteen and thirty-six in each township so surveyed shall not be sold until the claim of the State of Minnesota to the ownership of said sections as part of the school lands of said State shall have been determined."

6. Prior to the passage and approval of the amendatory act of February 26, 1896, *supra*, surveys and pretended examinations and appraisals had been made by the examiners appointed as aforesaid covering various lands ceded in trust for sale and disposition under the terms and conditions set forth in agreements entered into pursuant to the act of January 14, 1889. Included in such surveyed ceded lands as to which pretended examinations and estimates had been made were various 40-acre tracts and lots aggregating 115,342.78 acres forming a part of the ceded portion of the former Red Lake Reservation, all classified as pine lands under such act. As to all these "pine lands," the total appraised value of each tract as fixed by the Commissioner of the General Land Office and later approved by the then Secretary of the Interior, as hereinafter set forth, was an amount equal to the value of the quantity of pine timber shown to exist thereon by the reports of the aforementioned examiners, figured at the rate and price of three dollars a thousand board feet, save that in those few instances where the quantity of pine timber was shown to be so small as to amount to less than $1.25 an acre for the tract involved a valuation equal to $1.25 an acre was adopted, and such land was classified as "Agricultural land."

7. Thereafter, on April 24, 1896, the then Secretary of the Interior approved these examinations, reports, and appraisals, and on the same date the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, directed the Registers and Receivers at Crookston

and Duluth, Minnesota, that the 115,342.78 acres of ceded "pine lands" of the former Red Lake Reservation be offered for sale in accordance with instructions as follows:

> Under the provisions of the act of January 14, 1889 (25 Stat., 642), the Chippewa Indians have ceded and relinquished portions of the Red Lake Reservation, in the State of Minnesota.
>
> The examination of some of the ceded lands of the former Red Lake Reservation has been made, as provided in the fourth section of the act referred to, and it is proposed to offer the lands which have been found to be "pine lands" within the meaning of the statute.
>
> Annexed hereto is a copy of the fifth section of said act of January 14, 1889, as amended by the act of February 26, 1896 (Public—No. 28), which makes provisions for the disposal of said "pine lands."
>
> There is also annexed a descriptive list of the said lands, giving the quantity of pine timber reported by the examiners as having been found on each legal subdivision, and the appraised value of each tract.
>
> The law directs that these lands shall be offered for sale at public auction, to the highest bidder for cash, at not less than the appraised value, and provides that the lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the proper local land office.
>
> The offering of the lands within the Duluth district will commence at the district land office at Duluth at 9 a. m. on Wednesday, July 1, 1896, and the offering of the lands within the Crookston land district will commence at the district land office at Crookston at 9 a. m. on Wednesday, July 15, 1896, and will continue from day to day until each tract described in the annexed list shall have been offered for sale.
>
> You will make such arrangements in advance as may be necessary and proper for the sale, but you will employ no additional force nor purchase any supplies without first obtaining authority from this office. At the time fixed for the offering you will offer the lands by the smallest legal subdivision, in the order in which they appear in the annexed list, diligently proceeding until all the lands shall have been offered, and either sold or left unsold for want of a sufficient bid.
>
> You will previously provide a suitable list of the lands in your respective districts by the smallest legal

subdivisions as they are to be offered, with a heading which shall designate it as a list of the offerings of the Ceded Chippewa Pine Lands under the acts of January 14, 1889, and February 26, 1896, and you will enter thereon the offering of every tract as it is made, giving the date of the offering and indicating the result, with the number of entry, name of purchaser, and amount of bid, if sold, and if not sold giving the reason therefor. Any tract bid off and the purchase money therefor not paid will be again offered on the next succeeding day. Should any party fail to pay the amount of his bid for a tract of land after the same is awarded to him, you will not thereafter recognize a bid by such party.

For the payments made, the receiver will issue receipts of Form 4-131, properly modified to be numbered consecutively in the order of their issue, beginning with No. 1. The register will issue cash certificates of Form 4-189, properly modified by the insertion of the date of the act under which the sale is made.

At the close of the offering, you will make to this office a joint report of your proceedings, and forward therewith a clear transcript of the list of offerings, kept as hereinbefore directed, retaining the original on your files. You will properly enter the sales made on your records.

Any of the lands remaining unsold will, after the offering, be held subject to private sale for cash at not less than the appraised value thereof. No application for the purchase of any tract or private sale will be entertained until the termination of the offerings at your respective offices. Parties desiring to purchase at private sale will be required to make application on Form 4-001, properly modified, and the applications will be numbered consecutively in the order of their presentation at your respective offices, beginning with number 1 at each office, and be retained on your files.

The receipts and certificates issued for lands sold at private sale will be numbered in the same series used at the public sale and in the same series as those given to the cash receipts issued for the payments for the ceded agricultural lands which are subject to disposal under said act of January 14, 1889. The certificates and receipts issued for the sales at the public offering will be distinguished by noting thereon the words Public Sale Chippewa Pine Lands; those issued for the private entries of the pine lands by noting thereon the words, Private Sale Chippewa Pine Lands, and those is-

sued in connection with the payments for the agricultural lands by noting thereon the words, Chippewa Agricultural Lands.

The receipts issued for moneys received for said lands will be issued in duplicate and the duplicate receipt given to the purchaser.

Where one party purchases at either public or private sale more than one legal subdivision, you will not embrace in one certificate and receipt a greater number of subdivisions than can easily be written in the blank spaces left in the forms for that purpose without interlining. Where tracts in more than one section are embraced in one entry the descriptions should appear in the numerical order of the sections; but entries should not cover more than 640 acres each, and should, when practicable, be confined to one township and range.

You will report the sale of these lands on separate abstracts, to be forwarded with your regular monthly returns, together with any receipts and certificates issued for these lands during the month. The abstracts forwarded for the month, including the time of the public sale, will have the sales then made indicated thereon by the words, Public Sale, written opposite the entry of each on the abstracts. You will also report and account for the moneys received from the sales of these lands in separate monthly and quarterly returns.

Attached to these instructions was the act of February 26, 1896, and a printed list of the tracts constituting the 115,342.78 acres of "pine lands" describing each 40-acre tract or lot separately, and giving the quantities in thousand board feet of White pine and Norway pine shown on each tract by the minutes and reports of the examiners, and the appraised value of each tract.

8. Thereupon the 115,342.78 acres of plaintiffs' ceded "pine lands" of the former Red Lake Reservation were offered for sale pursuant to instructions above set forth, at the times and places therein provided. Of the lands so offered, tracts aggregating 32,820 acres were sold at public sale on July 1st and 15th, 1896. There were no bids for more than the appraised value of the lands, and the tracts were sold for not less than and at substantially the appraised value thereof which had been determined as set forth in the preceding findings. Thereafter, and prior to January 4, 1897, when

the Secretary of Interior suspended all private sales theretofore authorized under the instructions of April 24, 1896, tracts aggregating 32,218.33 acres out of the pine lands so offered were sold at private sale at the aforementioned appraised value of such tracts. This total of 65,038.33 acres, sold at both public and private sales under such offer, had been estimated by the incompetent examiners hereinbefore mentioned to contain a total of 118,224,000 board feet of standing pine timber, and the total appraised value thereof, as determined by the Secretary of the Interior as aforesaid, was $354,672. The total price for which the same was sold was $369,282.34.

9. After the offering of the 115,342.78 acres of plaintiffs' pine lands and the sale of 65,038.33 acres thereof, as above set forth, the then Secretary of the Interior having resigned and a new Secretary of the Interior having been appointed and qualified, the new Secretary on account of complaints and charges that the examinations and estimates had not been properly done, and of incompetency and mismanagement on the part of the examiners originally appointed to examine and determine the amount and the quality of the timber on these pine lands, on October 28, 1896, discharged such previously appointed examiners, each and every one thereof, and on January 4, 1897, suspended all further private sales under the offering of 115,342.78 acres and suspended all unpatented entries for pine lands in such area. On October 20, 1896, the Secretary designated and dispatched to Minnesota one J. George Wright, a competent and experienced Indian inspector, with instructions thoroughly to investigate, examine, and report upon the entire situation. The suspended unpatented entries were relieved from suspension by departmental decisions of March 15 and June 15, 1897 (24 L. D. 517), but, after receipt of the report of the investigations and examinations made by Indian Inspector Wright, the order prohibiting any further sales pursuant to the previous estimates and instructions was reaffirmed.

10. Indian Inspector Wright proceeded to Minnesota and to the territory of the ceded pine lands of the former Red Lake Reservation, as to which minutes and reports of ex-

aminations and estimates had been made by the examiners appointed as hereinbefore mentioned (including the 115,-342.78 acres offered for sale as above described). Upon arrival he selected and employed, pursuant to instructions, competent and experienced timber estimators and during the fall and winter of 1896 he had the estimators so engaged by him to reexamine, under his direct supervision and instructions, various 40-acre tracts and lots included within such 115,342.78 acres. The tracts so reexamined by these competent estimators were selected by Wright at random and without knowledge at the time of their selection as to the quantities or character of the timber thereon or the accuracy or inaccuracy of the work of estimating the quantity and quality of the timber that had been done by the examiners first appointed, as hereinbefore stated, but such tracts were selected so as to furnish specimens of the work performed by practically all of the corps of examiners and such selections were so distributed throughout the entire area as to be typical and indicative of conditions throughout the 115,342.78 acres and the 65,038.33 acres sold therefrom at public and private sales as aforesaid, and of the accuracy of the work done by the previous corps of examiners and the relation between the amounts of timber reported by them and the quantities actually existing upon such lands. The only reliable evidence available or in existence as to the quantity of pine timber in fact existing upon the 65,038.33 acres of plaintiffs' land at the dates of the public and private sales hereinbefore mentioned is the examinations and estimates made and recorded by the competent and experienced timber estimators employed by Wright and the information obtained by Wright at that time from other competent timber estimators who had examined and estimated the timber on certain additional tracts for persons interested in purchasing the same. The reasonableness of Wright's findings as to the excess quantity of timber over the amount previously determined is substantially corroborated by measurements in the log subsequently made in connection with the sale of the remaining unsold timber on 50,304.45 acres of timber land first

examined and estimated by the inexperienced and incompetent examiners.

11. On the eighty-five typical 40-acre tracts and lots so reexamined by the competent timber estimators employed for that purpose, but who had no knowledge of what previous examiners had determined in that regard, there was found to be standing 17,171,000 feet board measure of pine timber as compared with 9,635,000 feet reported by the previously appointed examiners; of these 85 40-acre tracts, 61 tracts had been sold and constituted a part of the 65,038.33 acres sold at public and private sale as hereinbefore described, and the remaining 24 tracts constituted a part of the unsold balance of 50,304.45 acres of the 115,342.78 acres. The 61 tracts which had been sold, but from which no timber had been removed, were found by the competent and experienced estimators employed by Wright to contain 12,472,000 feet board measure of standing pine timber as compared with 5,547,000 feet as shown by the reports and determinations of prior examiners, and the 24 unsold tracts were found by competent estimators to contain 4,699,000 feet board measure of standing pine timber as compared with 4,088,000 feet reported by the prior examiners. The results of these reexaminations of the 85 tracts are shown in detail in the following tabulation in which the first column indicates the number of the 40-acre tracts or lots reexamined in each section which had been already sold as above described; the second, third, and fourth columns indicate the sections, townships, and ranges in which the sold and unsold tracts so reexamined were situated; the fifth column indicates the number of thousand feet of standing pine timber found by the competent and experienced estimators employed by Indian Inspector Wright upon each tract previously sold as aforesaid; the sixth column indicates the number of thousand feet reported by the former estimators as to each of the tracts; the seventh column indicates the number of 40-acre tracts or lots reexamined in each of the sections which still remained unsold at the date of such reexamination; the eighth column indicates the quantity of timber found on such unsold tracts by the timber estimators employed by

Wright, and the last column indicates the quantities of timber on the unsold tracts which had been previously reported by the earlier examiners.

No.	Section	Township	Range	Found	Previously reported (sold)	No.	Found	Previously reported (not sold)
1	4	147	37	70	51			
2	5	147	37	319	194			
1	18	147	37	76	28			
2	19	148	35	172	118			
2	20	148	35	364	136			
1	30	148	35	127	71			
1	24	148	36	760	457	1	837	662
1	33	148	37	121	83			
1	1	149	33	47	28	1	120	95
1	6	149	33	59	14			
1	5	149	33		46	2	152	97
	1	149	34			3	800	377
1	7	149	33	59	18			
4	2	150	32	950	52			
1	11	150	32	11	10			
2	15	150	32	52	35			
2	31	150	33	240	74			
2	32	150	33	570	146			
4	33	150	33	1,720	1,416			
7	34	150	33	1,260	445	3	23	48
3	19	150	35	243	107	2	151	129
1	20	150	35	100	7			
2	21	150	35	190	42	2	318	600
2	23	150	35	691	376	8	1,771	1,815
8	24	150	35	3,590	1,157	2	527	265
1	29	151	32	67	100			
1	30	151	32	12	18			
1	31	151	32	85	65			
2	32	151	32	187	147			
1	6	149	33	90	15			
1	6	149	33	40	20			
1	6	149	33	200	71			
61				12,472M.	5,547M.	24	4,699	4,088
24				4,699	4,088			
85				17,171M.	9,635M.			

12. Inspector Wright further caused approximate estimates to be made by the competent estimators of the standing pine timber on 41 additional 40-acre tracts similarly selected at random and distributed throughout the area and constituting part of the 115,342.78 acres offered for sale in 1896 as aforesaid. Of these 41 tracts, 27 had been sold pursuant to the offering and constituted a part of the 65,038.33 acres sold at public and private sale in 1896 as before mentioned. On the 27 tracts, the competent estimators employed by Wright estimated and reported an approximate total of 7,115,000 feet board measure of standing pine timber as compared with 3,933,000 feet as shown by the reports of the previous examiners. On the remaining 14 tracts so estimated, which at the time of such estimate still remained

unsold, the estimators employed by Wright estimated and reported an approximate total of 2,690,000 feet board measure of standing pine timber as compared with 2,794,000 feet of such timber shown by the reports of the previous examiners. The detailed result of the estimates on the 41 additional 40-acre tracts is shown in the following tabulation:

Tract	Section	Township	Range	Approximate	Previously recorded	Remarks
NW.SE	6	149	33	175	37	Sold.
SW.SE	6	149	33	150	45	Do.
NW.NW	7	149	33	200	35	Do.
NE.NW	7	149	33	100	17	Do.
NW.NE	7	149	33	200	95	Do.
NW.NE	5	147	37	80	24	Do.
NW.NE	30	148	35	70	95	Do.
NW.NE	14	147	37	60	12	Do.
NW.NW	17	147	37	150	41	Do.
NW.NW	18	147	37	150	102	Do.
NE.SW	19	148	35	400	590	Not sold.
SE.NW	19	148	35	400	283	Do.
SE.NW	24	148	36	950	735	Sold.
NE.SW	24	148	36	950	505	Do.
NE.SE	24	148	36	650	493	Do.
SE.NE	24	148	36	300	184	Do.
NW.NE	24	148	36	850	651	Do.
SW.NE	1	149	34	400	58	Do.
NE.SW	1	149	34	400	87	Do.
SW.NW	14	149	35	350	365	Do.
SE.NW	14	149	35	100	30	Do.
NW.SW	14	149	35	75	32	Do.
SE.SW	15	149	35	125	208	Not sold.
SW.SW	15	149	35	250	87	Sold.
NW.SW	15	149	35	400	230	Not sold.
SW.NW	15	149	35	60	35	Sold.
NW.NW	15	149	35	15	33	Not sold.
NE.SW	15	149	35	40	37	Sold.
NE.SE	15	149	35	75	28	Do.
NW.SE	15	149	35	30	13	Do.
SE.NE	15	149	35	100	30	Not sold
SE.NE	21	150	35	150	308	Do.
Lot 8	21	150	35	175	152	Do.
Lot 7	21	150	35	100	108	Do.
SW.NE	22	149	33	100	30	Sold.
NW.NE	22	149	33	200	60	Do.
NE.NW	22	149	33	150	125	Not sold.
NW.NW	22	149	33	125	193	Do.
SW.NW	22	150	35	200	173	
SE.NW	22	150	35	100	134	
NW.SW	22	150	35	250	227	

In making the foregoing examinations and estimates no estimator knew at the time he made his estimate of the tracts assigned to him by Wright what tracts were assigned to any other estimator for examination. In some instances, the timber on the tracts was estimated by walking through and looking at the timber thereon; in others, the estimator walked over and through the tracts and estimated the quantity of timber thereon; in other instances, after the estimators had made reports to Wright as to the quantity of timber thereon, Wright had such tracts reexamined and

estimated by one of the other competent estimators and found the two estimates to be in practical accord, although the last estimator did not have any knowledge of what the first estimator had determined. In other instances, Wright and the competent estimators employed by him went upon and over certain tracts and calipered the trees for the purpose of verifying the accuracy of the estimates made by such competent estimators.

13. Indian Inspector Wright gathered further information from experienced timber estimators who had theretofore examined and estimated for bidders and purchasers 19 additional 40-acre tracts forming part of the 115,342.78 acres offered for sale as aforesaid, of which 10 tracts had been sold at the time of Wright's investigation and the balance remained unsold. On the 10 tracts which had been sold, these estimates showed that there was a total of 4,010,000 board feet of standing pine timber as compared with 2,190,000 board feet reported as standing thereon by the former examiners first appointed in 1891, and that upon the 9 tracts then remaining unsold there was standing 2,060,000 board feet of pine timber as compared with 1,360,000 board feet previously reported. The tracts so examined, the number of board feet so estimated to be on each tract, and the number of board feet previously reported, and whether the tracts were then sold or unsold, appear in the following tabulation:

Tract	Section	Township	Range	Estimated M feet	Previously recorded M feet	Remarks
NE.NW	24	148	36	900	767	Sold.
NW.NW	24	148	36	900	427	Do.
SW.SE	31	150	34	400	193	Not sold.
SE.SE	31	150	34	80	43	Sold.
SW.SE	33	150	34	125	15	Do.
NE.NE	35	150	34	57	37	Not sold
NE.NW	17	149	33	260	100	Sold.
NE.NW	18	149	33	330	110	Do.
NE.NW	33	150	33	450	247	Do.
SE.NW	33	150	33	365	295	Do.
NW.NE	21	150	33	151	95	Not sold.
SW.NE	21	150	33	121	181	Do.
SE.NW	21	150	33	85	50	Do.
NE.SE	21	100	33	255	149	Do.
NW.SE	21	150	33	286	159	Do.
SW.SE	21	150	33	405	299	Do
SE.SE	21	150	33	300	197	Do.
SE.NE	29	150	33	330	96	Sold.
NE.SE	29	150	33	270	90	Do.

14. Inspector Wright further conducted an investigation as to the qualifications and experience of the examiners first employed in 1891 by the Secretary of Interior acting for the United States in making the previous examinations upon which the final appraisal had been based. On December 31, 1896, he submitted to the then Secretary of the Interior a full report of his investigations. This report, after reciting his findings based upon the reexaminations of certain tracts by competent timber estimators, as aforesaid, stated:

> It will be noticed that tracts which I examined and found previously underestimated are generally sold, while others, found to be overestimated or nearly correct, remain unsold, demonstrating the fact that purchasers have in most instances had tracts examined before submitting bids or making purchases.

Inspector Wright further ascertained and reported other direct evidence of the fact that purchasers had themselves made such examinations before submitting bids. He further ascertained and reported, in accordance with the facts, (1) that the previous examiners had frequently been absent from duty for long periods when they were reported as on duty and were paid for such services; (2) that in some instances certain examiners had taken the figures of others and reported them as the results of their examinations of tracts of lands, without ever having visited the lands themselves; (3) that 18 out of the 35 examiners appointed had never had, nor claimed to have had, any previous experience as estimators of timber prior to their appointment, and so advised the Chief Examiner in charge of the work; (4) that the headquarters of the Chief Examiner was located about one hundred miles from the points where the examiners were employed, and that the Chief Examiner did not personally inspect the work of the men in the woods and did nothing to check the manner in which the work was performed, or its accuracy; (5) that the assistant chief examiner had never had any previous experience in estimating timber and had no knowledge regarding the manner in which the work was done or of its accuracy; (6) that the foreman in charge of the examiners was a man of experience as an estimator but that he assigned the work to others and did nothing to check their estimates or to ascertain the correctness of the

work or the manner in which the same was done, and was not given time nor opportunity to do so. The foreman, an experienced timber estimator, originally employed and placed in charge of the men, considered that only 10 of the 35 estimators were experienced and the remaining 25 were inexperienced and incompetent when appointed.

15. This report by Inspector Wright, which stated the actual facts, was transmitted to the Commissioner of Indian Affairs and such Commissioner transmitted the report to the then Secretary of the Interior January 26, 1897, accompanied by a letter in which he stated, among other things, the following:

> I have examined Inspector Wright's report carefully and given consideration thereto. From the facts shown in the report and accompanying papers, it is quite clear in my mind that the estimates heretofore made are absolutely worthless as indicating with any degree of accuracy the amount of timber on the lands that have been examined and that the sale of timber upon the basis of these estimates would be unjust to the Indians in the extreme and against the interests of the United States * * *.
>
> * * * The estimates already made have been shown to be totally unreliable and very much to the disadvantage of the Indians and the Government * * *. In the meantime, pending the consideration of this matter and the final adoption of some method for the protection of the Government and the Indians in the premises, I would recommend that all the lands that have heretofore been offered for sale, and the sales have not been consummated, be withdrawn from sale, and that the sales already actually made of tracts that may be shown to contain a large excess of timber over that estimated by the Government estimators be canceled for inadequacy of consideration, allowing such sales where the actual amount of timber standing on the lands is not greatly in excess of the estimates on which the same was sold.

In his annual report for 1897, the Secretary of the Interior set forth, among other things, the following statement with regard to the transactions here involved:

> Investigation has shown that the estimates made by examiners heretofore appointed under said act (Act of January 14, 1889) were erroneous, and as the Indians

were in danger of being deprived of just revenues from the sale of pine lands, a new estimate has been ordered.

16. Thereafter, following an investigation and consideration by Congress of the facts found and reported as hereinbefore stated (see Senate Doc. 85, 55th Cong., 1st sess., and House Report 1473, 57th Cong., 1st sess.), there was introduced in the 57th Congress a bill which became the act of June 27, 1902, 32 Stat. 400, by the terms of which the act of January 14, 1889, *supra*, was amended with regard to the manner in which the remaining unsold pine lands of plaintiffs should be disposed of, it being provided in substance that the pine timber should thereafter be sold separate from the land and be scaled under Scribner's Rules in the log after being cut. The Committee on Indian Affairs of the House of Representatives, H. R. Rep. 1473, 57th Cong., 1st sess., recommended this bill for passage and described the appraisals as made by incompetent examiners, as hereinbefore stated, in part, as follows:

> An examination of the reports of the various corps of examiners will convince anyone that great frauds were committed. Upon investigation it was found that many tracts of pine contained twice the amount reported in the estimate * * *.
>
> The timber upon the reservation is very valuable, and if properly sold will bring the tribes many millions of dollars. Great wrongs have been perpetrated against these Indians, their pine lands have been undervalued, and the Secretary of the Interior has been powerless to protect them.

The official records of the Department of the Interior showed that the examinations and estimates made by the examiners prior to Inspector Wright's examinations and estimates were grossly erroneous, and disclosed as the quantity of timber standing upon such lands an amount which was far below the quantity actually thereon. This is disclosed in a special report made by the Secretary of the Interior July 31, 1902, to the Senate Committee on Indian Affairs at the request of the chairman of that committee, in which the Secretary stated in part as follows:

> On March 2, 1903, a sale of the pine timber was held under the act of June 27, 1902, 32 Stat. 400. This sale

included the timber on certain sections, sixteen and thirty-six, at the Red Lake and White Earth Reservations omitted from the sales of 1896, 1898, and 1900 for the reason that the State of Minnesota was claiming said sections under its school grant. This contention was decided adversely, however. The timber on these sections had been estimated by the same estimators and at the same time as the other lands [115,342.78 acres] mentioned in the earlier sales. At the sale in 1903, the timber on 7,912.35 acres, estimated to contain 13,636,000 feet, was sold. The timber cut on this land was scaled by United States scalers, and scaled 26,816,102 feet, or an increase of nearly 100 percent. This is a larger increase than is shown at any of the other sales [of land previously estimated] held under the act of June 27, 1902, the usual overrun being from 25 to 40 percent.

17. The tracts constituting the 65,038.33 acres of plaintiffs' Red Lake Reservation pine lands sold in 1896 in fact then contained more than 236,448,000 board feet of standing pine timber instead of 118,224,000 feet as reported by the first examiners on the basis of whose estimates they were sold. Had these lands been examined by competent and experienced examiners as required by the act of January 14, 1889, and as promised in the agreements of cession between plaintiffs and the United States in which the lands were ceded for the purpose of sale, the presence of this 236,448,000 feet of standing pine timber thereon would have appeared in their reports, and the minimum appraised value thereof at $3 a thousand feet would have been $709,344 instead of $354,672 as the same was actually appraised upon the basis of estimates of the incompetent estimators. The prevailing market price at the time the 65,038.33 acres were appraised and sold, for similar pine stumpage similarly situated, was substantially more than $3 a thousand board feet, and exceeded $5 a thousand board feet.

The 65,038.33 acres of plaintiffs' pine lands were estimated and disposed of in violation of the express provisions of section 4 of the act of January 14, 1889, and the agreements entered into between plaintiffs and the defendant, in that such timber lands were for the reasons hereinbefore stated sold for far less than $3 a thousand feet board measure of

the pine timber standing thereon and that, in consequence of such unlawful disposition and breach of the agreement by the defendant, the plaintiffs were damaged and suffered a loss of $340,061.66 representing the difference between $709,344, which was the minimum price for which the 65,038.33 acres of land containing at least 236,448,000 feet of timber could and should have been lawfully sold, and $369,282.34, which was the amount actually received therefor.

18. Commencing during the fiscal year beginning July 1, 1891, and continuing to the time when the examiners first appointed in 1891 were discharged on October 28, 1896, the defendant expended the sum of $79,597.12 in connection with the examinations and estimates of the 115,342.78 acres of pine lands ceded by plaintiffs for sale by the agreements between plaintiffs and defendant under the act entered into January 14, 1889. By reason of the inexperience and incompetency of the examiners appointed, as hereinbefore stated, and the manner in which the examinations and estimates made by them were carried on, as hereinbefore more particularly set forth, the estimates, reports, and appraisals produced as a result of their work were worthless and unreliable for any purpose and were discarded and disregarded late in 1896 as of no value whatever either to the Indians or to the defendant, and the sum of $79,597.12 of plaintiffs' funds was wasted and plaintiffs were thereby damaged to that extent in that they received no benefit therefrom but, instead, suffered a loss as stated in the preceding finding. Thereafter, on May 16, 1911, the defendant reimbursed itself from plaintiffs' funds under section 7 of the act of January 14, 1889, for the expense of completing the surveys, examinations, and appraisals and, in so doing, took from the principal permanent interest-bearing fund established under section 7 of the act of 1889, consisting of the proceeds of the sale of lands and timbers ceded and disposed of thereunder, the sum of $169,954.65 on account of "Expenses in Examining and Appraising Chippewa Lands" during the fiscal years 1892 to 1896, inclusive. There was included in this sum of $169,954.65, for which the defendant reimbursed itself as above-mentioned, the sum of $79,597.12

expended in connection with the worthless examinations and appraisals of the 115,342.78 acres as above described.

DEFENDANT'S CLAIMS FOR EXCESS PAYMENTS ALLEGED TO HAVE BEEN MADE FOR PLAINTIFFS' BENEFIT.

19. The treaty with the Chippewa Indians of the Mississippi, concluded March 19, 1867 (16 Stat. 719), provided:

> ART. III. In further consideration for the lands herein ceded, * * * the United States agree to pay the following sums, to wit: * * * four thousand dollars each year for ten years, and as long as the President may deem necessary after the ratification of this treaty, for the support of a school or schools upon said reservation * * *.

Subsequent to the payment of the ten installments mentioned in the above article, the President of the United States deemed that continuation of the annual payments under the treaty to be necessary and the Congress appropriated and the United States disbursed for the maintenance of schools on the White Earth and Leech Lake reservations in Minnesota for the benefit of Chippewa Indians of Minnesota the further sum of $167,125.52 in addition to the first ten installments. No part of the last-mentioned sum has been reimbursed to the United States.

20. By the act of June 22, 1936 (49 Stat. 1765), Congress appropriated from public funds and directed immediate payment to the plaintiffs of the sum of $223,162.62 in payment for 178,530.10 acres of swamplands lying within the boundaries of certain of the reservations established by treaties with Chippewa Indians made in 1863, 1864, and 1867, and ceded in trust under the act of January 14, 1889, *supra*, and which swamplands were patented to the State of Minnesota under the so-called Swamp Land Acts of 1857 and 1860.

21. In the settlement made on May 26, 1926, with the Chippewa Indians of Minnesota for lands taken under the Free Homestead Act, under authority of the act of February 9, 1925, and the act of March 3, 1926, the Indians were paid for 6,236.60 acres in excess of the actual acreage taken, at the rate of $1.25 an acre, amounting to $7,795.75; and they were also paid interest thereon at the rate of 5 percent per annum from December 31, 1922, to May 26, 1926, amounting to

$1,325.25, making a total overpayment of $9,121.00, no part of which has been repaid to the United States.

OFFSETS FOR GRATUITOUS EXPENDITURES FROM PUBLIC FUNDS FOR BENEFIT OF PLAINTIFFS.

22. During the period from January 14, 1889, to June 30, 1934, the defendant appropriated and expended from public funds, gratuitously and without obligation under any treaty or agreement and for the benefit of plaintiffs, a total of $4,666,469.81 in the years, for the purposes, and in the amounts shown in the following findings.

23. During the period January 14, 1889, to June 30, 1927, the United States, although under no obligation by treaty or agreement so to do, expended gratuitously out of public funds for the benefit of the Chippewa Indians of Minnesota under specific appropriations the sum of $409,-551.21 for the purposes and in the amounts as follows:

Education	$153, 368. 95
Pay of farmers	12, 844. 98
Miscellaneous employees	35, 037. 93
Saw and grist mills	5, 088. 86
Telephone lines	1, 000. 00
Purchase of land for allotment	645. 00
Agricultural aid	$5, 160. 06
Clothing	8, 611. 67
Provisions and other rations	31, 008. 80
Agricultural implements and equipment	19, 654. 06
Work and stock animals	550. 00
Feed and care of livestock	2, 910. 41
Agency buildings and repairs	16, 200. 81
Miscellaneous building material	245. 00
Boats, docks, etc	2, 359. 71
Enrollment of allottees	15, 763. 97
Burial of Indians	300. 07
Surveying, allotting, sale, etc., lands	7, 182. 70
Bridges	1, 690. 00
Roads	200. 00
Fuel and light	1, 512. 03
Miscellaneous agency expenses	726. 91
Hardware, glass, oils, and paints	24, 424. 64
Medical attention	33, 511. 19
Indian houses	150. 00
Household equipment	6, 393. 18
Pay of mechanics	23, 010. 28
	409, 551. 21

No part of the aforesaid sum of $409,551.21 has been reimbursed to the United States.

24. During the period January 14, 1889, to June 30, 1927, the United States, although under no obligation by treaty or agreement so to do, expended gratuitously out of public funds for the benefit of the Chippewa Indians of Minnesota under other than treaty appropriations the sum of $2,426,834.44 for the purposes and in the amounts as follows:

Education	$1, 275, 968. 67
Medical attention	21, 395. 14
Agency buildings and repairs	111, 353. 96
Miscellaneous building material	16, 965. 80
Saw and grist mills	374. 07
Expenses, care, and sale of timber	80, 071. 19
Examining and appraising land	7, 345. 28
Surveying, allotting, sale, etc., lands	15, 442. 80
Removals	49. 58
Provisions and other rations	13, 437. 50
Agricultural implements and equipment	857. 82
Work and stock animals	1, 050. 00
Feed and care of livestock	9, 902. 97
Hardware, glass, oils, and paints	5, 228. 18
Household equipment	1, 527. 10
Fuel and light	2, 313. 63
Pay of mechanics	7, 045. 61
Miscellaneous employees	11, 219. 71
Transportation of supplies	189, 038. 18
Agricultural aid	5, 424. 50
Miscellaneous agency expenses	45, 110. 07
Councils and delegations	1, 647. 11
Pay of agents and subagents	39, 850. 89
Pay of interpreters	13, 387. 02
Pay and expenses of Indian police	349, 413. 09
Burial of Indians	574. 91
Telephone lines	3, 867. 88
Boats, docks, etc	249. 00
Investigating land frauds	31, 434. 55
Drainage	24. 50
Indian houses	319. 67
Hospitals and equipment	23, 048. 79
Care of indigent Indians	$377. 75
Payments to Minnesota public school system	5, 302. 22
Roads	4, 239. 30
Bridges	152. 00
Pay of farmers	97, 582. 26
Expenses of Chippewa Commission	546. 08

Pay of Indian judges	$9,822.13
Clothing	112.50
Suppression of liquor traffic	23,761.03
	2,426,834.44

No part of the aforesaid sum of $2,426,834.44 has been reimbursed to the United States.

25. During the period July 1, 1927, to June 30, 1934, the United States, although under no obligation by treaty or agreement so to do, expended gratuitously out of public funds for the benefit of the Chippewa Indians of Minnesota under other than treaty appropriations the sum of $372,165.64, no part of which has been reimbursed to the United States, for the purposes and in the amounts shown as follows:

Agency buildings and repairs	$39,145.09
Agricultural aid	2,068.87
Agricultural implements and equipment	9.36
Automobiles and repairs	5,868.28
Burial of Indians	156.48
Care of indigent Indians	82.52
Education	63,771.63
Expense, care, and sale of timber	457.80
Fuel and light	49.33
Hardware, glass, oils, and paints	505.65
Hospitals and equipment	1,461.49
Medical attention	9,998.72
Miscellaneous agency expenses	3,536.94
Miscellaneous employees	58,852.12
Pay and expenses of field nurses	36,884.65
Pay and expenses of Indian police	36,996.11
Pay of Indian judges	1,081.57
Payments to Minnesota public school system	12,545.73
Provisions and other rations	1,358.54
Roads	24,760.05
Suppression of liquor traffic	14.59
Surveying, allotting, sale, etc., lands	3.43
Transportation, etc., of supplies	72,539.91
Transportation of Indians	16.78
	372,165.64

26. During the years indicated in the following ten tables the United States supported, maintained, and operated non-reservation Indian schools at Carlisle, Pennsylvania; Chemawa, Oregon (Salem Indian School); Chilocco, Oklahoma;

Fort Totten, North Dakota; Genoa, Nebraska; Lawrence, Kansas (Haskell Institute); Pierre, South Dakota; Pipestone, Minnesota; Tomah, Wisconsin; and Wahpeton, North Dakota; and the United States, although under no legal or treaty obligation to do so, supported and educated therein children of the Chippewa Indians of Minnesota at a cost, based on the percentage of Chippewa Indian children to the total attendance of all Indian children, of $1,457,918.52. No part of that sum has been reimbursed to the United States.

CARLISLE INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1891	1	837	838	0.001193	$105,695.56	$126.09
1892	5	829	834	.005995	103,651.47	621.39
1893	3	787	790	.003797	105,108.33	399.09
1894	2	745	747	.002677	102,861.97	275.36
1895	4	784	788	.005076	102,792.88	521.77
1896	2	798	800	.0025	101,020.67	252.55
1897	1	815	816	.001225	106,158.54	130.04
1898	2	895	897	.002229	111,247.90	247.97
1899	2	925	927	.002157	112,462.20	242.58
1900	2	1,044	1,046	.001912	129,238.50	247.10
1901	2	1,042	1,044	.001915	131,822.66	252.44
1902	1	1,071	1,072	.000933	144,794.45	135.09
1903	1	1,073	1,074	.000931	145,186.82	135.16
1904	1	1,069	1,070	.000934	145,159.41	135.57
1905	1	952	953	.001049	146,417.96	153.59
1906	2	999	1,001	.001998	146,926.94	293.56
1907	2	1,007	1,009	.001982	150,255.19	295.90
1908	1	1,004	1,005	.000995	156,229.36	155.44
1910	7	1,006	1,013	.006910	151,091.70	1,044.04
1911	32	1,038	1,070	.029906	141,548.35	4,233.14
1912	39	813	852	.045774	151,789.33	6,943.45
1913	31	800	831	.037304	145,908.94	5,442.98
1914	16	792	808	.019801	147,262.58	2,915.94
1915	10	655	665	.015037	142,998.74	2,150.27
1916	5	540	545	.009174	140,371.56	1,287.76
1917	4	394	398	.010050	141,057.70	1,417.62
1918	1	149	150	.006666	147,029.28	980.09
Total						31,035.98

SALEM INDIAN SCHOOL, CHEMAWA, OREG.

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1926	6	902	908	0.006607	$182,739.34	$1,207.35
1927	8	1,069	1,077	.007428	237,720.50	1,765.78
1928	3	978	981	.003058	240,581.90	735.69
1929	2	670	672	.002976	329,398.33	980.28
1930	1	751	752	.001329	233,031.36	309.69
1931	1	811	812	.001231	271,841.25	334.63
1932	2	730	732	.002732	271,416.62	741.51
1933	4	805	809	.004944	213,331.89	1,054.71
Total						7,129.64

CHILOCCO INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1908	10	605	615	0.016260	$134,106.90	$2,180.57

FORT TOTTEN INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1928	2	273	275	0.007272	$81,617.91	$593.52
1929	6	325	331	.018126	84,255.50	1,527.21
1930	2	302	304	.006578	94,825.85	623.76
1931	4	311	315	.012698	108,580.85	1,378.75
1932	4	314	318	.012578	100,605.52	1,265.41
1933	5	289	294	.017006	75,768.65	1,288.52
Total						6,677.17

GENOA INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1913	32	323	355	0.090141	$59,781.78	$5,388.78
1914	21	331	352	.059656	72,676.44	4,335.58
1915	21	367	388	.054123	68,799.47	3,723.63
1916	20	363	383	.052219	70,901.04	3,702.38
1917	2	389	391	.005115	77,326.33	395.52
1918	4	346	350	.011428	80,185.36	916.35
1919	6	330	336	.017857	85,262.54	1,522.53
1920	5	382	387	.012919	102,124.05	1,319.34
1921	5	439	444	.011262	110,552.57	1,245.04
1922	4	361	365	.010959	108,262.26	1,186.44
1923	2	423	425	.004706	109,049.52	513.18
1924	1	480	481	.002079	103,538.69	215.25
1925	1	476	477	.002096	127,436.79	267.10
1926	1	499	500	.002	86,140.31	172.28
1928	2	541	543	.003683	134,124.57	493.98
1932	2	569	571	.003502	183,173.91	641.47
1933	5	550	555	.009009	159,416.64	1,436.18
Total						27,475.03

Reporter's Statement of the Case

HASKELL INSTITUTE, LAWRENCE, KANS.

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1926	3	944	947	0.003167	$155,987.72	$494.01
1927	5	962	967	.005170	211,564.83	1,093.79
1928	6	986	992	.006048	193,655.35	1,171.22
1929	5	937	942	.005307	218,801.13	1,161.17
1931	26	1,105	1,131	.022988	360,545.01	8,288.20
1932	26	1,039	1,065	.024413	320,464.29	7,823.49
1933	22	907	929	.023681	274,924.29	6,510.48
Total						26,542.36

PIERRE INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1892	27	80	107	0.252336	$25,565.96	$6,451.21
1894	10	107	117	.085471	19,392.63	1,657.50
1895	30	84	114	.263158	17,003.70	4,474.65
1896	104	59	163	.638037	22,052.48	14,070.29
1897	103	27	130	.792307	25,471.90	20,181.56
1898	47	54	101	.465346	26,199.72	12,191.93
1899	74	77	151	.490066	26,680.47	13,075.19
1900	48	60	108	.444444	22,756.40	10,113.94
1901	64	77	141	.453901	20,869.25	9,472.57
1902	61	104	165	.369697	26,193.03	9,683.48
1903	35	65	100	.35	26,631.87	9,321.15
1904	24	116	140	.171429	27,893.73	4,781.79
1905	15	136	151	.099337	27,279.76	2,709.88
1906	7	139	146	.047945	28,680.61	1,375.09
1907	4	149	153	.026144	28,065.71	733.74
1912	1	148	149	.006711	34,657.97	232.58
1913	1	194	195	.005128	34,661.84	177.74
1914	1	186	187	.005347	34,250.57	183.13
1915	1	235	236	.004237	42,728.59	181.04
1916	1	259	260	.003846	43,121.30	165.84
1917	1	222	223	.004484	42,811.67	191.96
1918	1	224	225	.004444	42,661.43	189.58
1931	1	359	360	.002777	128,851.32	357.82
1932	4	376	380	.010526	127,844.09	1,345.68
1933	4	325	329	.012158	100,687.96	1,224.16
Total						124,543.50

PIPESTONE INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1893	10	15	25	0.4	$12,083.42	$4,833.36
1894	28	36	64	.4375	12,148.55	5,314.99
1895	71	40	111	.639639	11,043.34	7,063.75
1896	114	21	135	.844444	11,408.81	9,634.10
1897	129	22	151	.854304	14,190.27	12,122.80
1898	131	16	147	.891156	15,376.02	13,702.43
1899	134	24	158	.848101	15,149.10	12,847.96
1900	120	26	146	.821917	16,905.41	13,894.84
1901	130	26	156	.833333	21,319.06	17,765.87
1902	148	40	188	.787234	13,027.39	10,255.60
1903	145	55	200	.725	20,424.03	14,807.42
1904	152	70	222	.684684	22,616.36	15,485.05
1905	188	69	257	.731517	28,069.54	20,533.34
1906	229	54	283	.809187	40,741.35	32,967.37
1907	245	42	287	.853658	32,691.77	27,907.59
1908	218	62	280	.778571	38,393.83	29,892.32
1909	201	60	261	.770114	37,188.08	28,639.06
1910	185	57	242	.764462	36,012.17	27,529.93
1911	138	61	199	.693467	38,300.10	26,559.85
1912	186	88	274	.678832	38,930.03	26,426.95
1913	146	138	284	.514081	41,529.33	21,349.43
1914	144	134	278	.517985	42,852.48	22,196.94
1915	151	161	312	.483974	39,280.60	19,010.78
1916	121	153	274	.441605	39,975.85	17,653.53
1917	86	135	221	.389140	37,999.89	14,787.27
1918	66	176	242	.272727	39,057.82	10,652.12
1919	42	167	209	.200956	42,233.60	8,487.09
1920	39	188	227	.171806	52,298.84	8,985.25
1921	32	187	219	.146118	55,368.44	8,090.32
1922	27	190	217	.124423	52,361.00	6,514.91
1923	37	179	216	.171296	52,839.22	9,051.14
1924	48	174	222	.216216	50,358.24	10,888.25
1925	68	191	259	.262548	58,671.37	15,404.05
1926	64	208	272	.235294	54,222.80	12,758.29
1928	73	227	300	.243333	82,212.43	20,004.99
1929	69	250	319	.216300	83,379.29	18,034.94
1930	86	240	326	.263803	86,692.28	22,869.68
1931	94	238	332	.283132	115,630.88	32,738.80
1932	111	217	328	.338414	108,230.50	36,626.71
1933	129	226	355	.363380	98,418.68	35,763.37
Total						710,052.44

TOMAH INDIAN SCHOOL

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnestoa	Other Indians	Total			
1912	2	265	267	0.007490	$44,864.75	$336.03
1913	1	284	285	.003508	48,488.53	170.09
1915	11	257	268	.041044	46,223.14	1,897.18
1918	53	235	288	.184027	50,054.44	10,131.50
1919	52	256	308	.168831	61,663.10	10,410.64
1920	42	290	332	.126506	73,197.49	9,259.92
1921	25	285	310	.080645	78,592.81	6,338.11
1922	20	317	337	.059347	71,861.10	4,264.74
1923	37	279	316	.117088	71,535.60	8,375.96
1924	8	298	306	.026143	73,436.14	1,919.84
1925	1	346	347	.002881	77,384.01	222.94
1926	2	358	360	.005555	70,703.65	392.75
1929	39	335	374	.104278	101,615.24	10,596.23
1930	29	365	394	.073604	100,531.22	7,399.49
1931	21	369	390	.053846	137,104.99	7,382.55
1932	22	351	373	.058981	136,091.92	8,026.83
1933	11	317	328	.033536	114,937.82	3,854.54
Total						90,979.34

WAHPETON INDIAN SCHOOL, WAHPETON, N. DAK.

Year	Attendance			Percent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of buildings	Amount chargeable to Chippewa Indians of Minnesota
	Chippewa Indians of Minnesota	Other Indians	Total			
1909	14	31	45	0.311111	$21,765.38	$6,771.44
1910	14	27	41	.341463	16,391.44	6,621.45
1911	13	18	31	.419354	21,077.03	8,838.73
1912	38	53	91	.417582	19,366.30	8,087.01
1914	96	93	189	.507936	36,686.77	18,634.53
1919	47	140	187	.251336	44,193.15	11,107.32
1920	53	161	214	.247663	51,594.23	12,777.97
1921	53	158	211	.251184	65,349.73	16,414.80
1922	73	146	219	.333333	51,265.82	17,088.61
1923	83	133	216	.384257	49,871.80	19,163.58
1924	87	145	232	.375	54,014.75	20,255.53
1925	72	152	224	.321428	61,190.16	19,668.22
1926	87	144	231	.376623	50,054.20	18,851.56
1927	94	139	233	.403433	55,851.91	22,643.71
1929	113	238	351	.321937	92,501.86	29,779.76
1930	107	261	368	.290760	91,801.12	26,692.09
1931	113	249	362	.312154	125,405.13	39,145.71
1932	139	239	378	.367724	103,277.44	37,977.59
1933	160	204	364	.439560	96,645.16	42,481.34
1934	196	164	360	.544444	88,717.21	48,301.54
Total						431,302.49

The court decided as a conclusion of law that plaintiffs were entitled to recover $1,277,800.74, and that upon defendant's claim for offsets for excess payments and gratuity

expenditures the defendant was entitled to offsets totaling $4,675,590.81 paid or credited to plaintiffs or expended gratuitously from public funds for benefit of plaintiffs.

LITTLETON, *Judge*, delivered the opinion of the court:

The jurisdictional act in this case, approved May 14, 1926, 44 Stat. 555, as amended by the act of April 11, 1928, 45 Stat. 423, authorizes and directs this court to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims of plaintiffs arising under or growing out of the act of January 14, 1889, 25 Stat. 642, arising under or growing out of any subsequent act of Congress relating to Indian affairs; that official letters, papers, documents, and records, or certified copies thereof, may be used in evidence; that the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the plaintiffs and any payment or payments made by the United States upon any claim against it by plaintiffs should not operate as an estoppel but may be pleaded as an offset as may gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889; and that if it should be determined by the court that the United States has in violation of the terms and provisions of any law, treaty, or agreement as provided in section 1, unlawfully appropriated or disposed of any money or property belonging to the Indians, damages therefor should be confined to the value of the money or property at the time of its appropriation or disposal together with interest thereon at 5 percent per annum from the date thereof. It should be noted at the outset that the jurisdictional act authorizes this court to determine and award damages for the disposition of any of the property of plaintiffs in violation of the terms and provisions of any law, treaty, or agreement with respect to any claim or claims arising under or growing out of the act of January 14, 1889, *supra*. The claim of plaintiffs in this case arises under and grows out of such act of 1889. It is claimed that in violation of section 4 of that act and of the agreements subsequently made which embodied the provisions of that and other sections, the defendant, through the Secretary of the Interior who was duly authorized and di-

rected to act for the defendant in that regard, unlawfully disposed of 65,038.33 acres of its timber lands in such a way and under such circumstances as to result in actual damage to plaintiffs in the amount of $340,061.66 in that the defendant sold a certain quantity of pine timber belonging to plaintiffs of that value for which plaintiff received nothing. The other item in plaintiffs' claim is for $79, 597.12 for which the defendant reimbursed itself out of plaintiffs' funds as the cost of making a grossly erroneous examination and estimate of certain of its timber lands for the purpose of sale under the provisions of the act of 1889 and agreements entered into pursuant thereto by inexperienced and incompetent examiners and estimators, which examinations and estimates were worthless.

Upon the whole record, which establishes to our entire satisfaction the facts as set forth in the findings, we are of opinion that plaintiffs are correct in their claim as to both items and that they are entitled to judgment for so much thereof as may be in excess of the total of any offsets to which the defendant may be entitled under the jurisdictional act.

The defendant contends that if the Commissioner of the General Land Office, the Commissioner of Indian Affairs, and the Secretary of the Interior violated their duties under the law and the agreements with plaintiff, they were guilty of such misfeasance, nonfeasance, and negligence as amount to torts, for which no recovery by plaintiffs can be had under the jurisdictional act; that since an estimate of the quantity and quality of the standing timber made by cruising is wholly the result of the individual judgment of the cruiser, its degree of accuracy may not be definitely determined by a like estimate by another cruiser, based upon his individual judgment, but that its degree of accuracy may only be determined by some different and obviously more accurate method of ascertaining that quantity and quality; that in the event the court should hold that the timber estimates for certain tracts made in the fall and winter of 1896 by Inspector Wright and the cruisers employed by him as set forth in the findings are more nearly accurate than those made by

previous examiners for the same tracts, and that since, on the whole, the last determinations as to quantity of timber being larger as to the tracts theretofore sold, that plaintiffs suffered a corresponding loss, then the variance thus shown must be confined to the few tracts examined by Inspector Wright and his experienced and competent examiners, and does not constitute reliable evidence that the previous examinations and estimates of other tracts not reexamined and estimated were inaccurate in any degree.

In addition, counsel for defendant contend as to the second claim that the expenditures totaling $79,597.12 for making the first examinations and estimates as to the timberlands actually sold under such estimates were tortious or resulted from errors of judgment, and that no recovery may be had; and since, as first contended above, no loss has been established by competent proof, this expenditure cannot be held to have been unlawfully or wastefully made.

We are of opinion that none of these contentions can be sustained under the facts disclosed by the record. Plaintiffs' claims are not founded upon, nor do they grow out of, any willful or careless neglect of duty by any official of the government authorized and directed to act in the premises. The claims of plaintiffs arise under, grow out of, and are founded upon the express provisions of sections 4 and 5 of the act of January 14, 1889, *supra*, and the agreements duly made and entered into thereunder, and it is immaterial to plaintiffs' right to recover that the facts of record disclose that certain officers of the defendant may have acted carelessly and negligently in the selection and appointment of the examiners who examined and estimated certain of plaintiffs' timberlands upon the basis of which a certain number of acres of timber was sold. The statute or agreement which grants the right upon which the claim is based determines the question of jurisdiction rather than the conduct of the defendant's authorized agents which constituted the breach. *Cohens* v. *Virginia*, 6 Wheat. 264, 379; *New Orleans M. & C. R. R. Co.* v. *Mississippi*, 102 U. S. 135, 141; *Starin* v. *New York*, 115 U. S. 248; *Germania Insurance Co.* v. *Wisconsin*, 119 U. S. 473; *Carson* v. *Dunham*, 121 U. S.

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421; *Cunningham* v. *Neagle*, 135 U. S. 1; *Hughes* v. *Northern Pacific R. R. Co.*, 18 Fed. 106, 110; *Magill* v. *Parsons*, 4 Conn. 317, 323, 331.

The facts disclose beyond question that the defendant through the Secretary of the Interior, who was the official authorized and directed to act for the defendant in the matter, selected and appointed thirty-five examiners, twenty-five of whom were inexperienced and incompetent, and that the one really experienced and competent examiner who was made foreman did not and was not permitted to check and verify the examinations and estimates made by the others. The fact that the acts which constituted the breach of duty, or of the agreement, were aggravated does not affect the right of plaintiffs to maintain and recover on the claim arising under or growing out of the statute or agreement. The acts of the defendant through its authorized officer constituted a violation of the terms and provisions of the act of 1889 and the agreements made thereunder, and the jurisdictional act specifically authorizes this court to adjudicate and render judgment on any such claim. See *Minnesota* v. *Hitchcock*, 185 U. S. 373; *United States* v. *Mille Lac Band of Chippewas*, 229 U. S. 498.

It is unnecessary to discuss in detail the defendant's contention that the record is not sufficient to establish that plaintiffs in fact sustained a loss, or, if such fact of loss should be held to be established, that the amount thereof cannot be determined except on the basis of mere conjecture. The facts as we have found them to be established by the record are set forth in the findings and need not be repeated here. We are satisfied beyond a reasonable doubt that plaintiffs did sustain an actual loss and that the amount thereof, upon the basis of the examinations and estimates made by Inspector J. George Wright and the experienced and competent estimators employed by him, the manner in which they selected the various tracts which were reexamined and estimated, and the facts subsequently disclosed by measurement in the log of the timber cut from certain unsold lands previously examined and estimated, was at least $340,061.66. We have so found. The examinations and estimates made by Inspector Wright and his men are clearly established by

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the record to have been reasonable and in no case in excess of the timber actually standing upon the lands included in the previous incorrect and incompetent examinations of estimates with respect to the 65,038.33 acres of timberland sold. The tracts selected for reexamination and estimate were typical of the entire 115,342.78 acres previously examined and estimated. The facts subsequently ascertained in 1903 with reference to the quantity of timber upon the unsold portion of the 115,342.78 acres verify the reasonableness and accuracy of Inspector Wright's determination of the quantity of timber on the 65,038.33 acres sold at public and private sales between July and October 1896 in excess of the quantity estimated by the incompetent and inexperienced examiners, and for which plaintiffs received nothing. In *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359, which involved a loss of profits which the plaintiff claimed it would have earned if it had been permitted to sell defendant's goods, the court, after referring with approval to the holding of the court below that damages are not rendered uncertain because they cannot be calculated with exactness, and that it is sufficient if a reasonable basis of computation is afforded, although the result be only approximate, said: "This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." See, also to the same effect, *Story Parchment Co.* v. *Patterson Parchment Paper Co. et al.*, 282 U. S. 555; *Linen Thread Co.* v. *Shaw et al.*, 9 Fed. (2d) 17; *Prejean* v. *Delaware-Louisiana Fur-Trapping Co., Inc.*, 13 Fed. (2d) 71; *Calkins* v. *Woolworth Co.*, 27 Fed. (2d) 314; *Rynveld* v. *Dupuis*, 39 Fed. (2d) 399; *Crichfield* v. *Julia*, 147 Fed. 65; *Electric Boat Co.* v. *United States*, 66 C. Cls. 333; *Hoffer Oil Corp.* v. *Carpenter*, 34 Fed. (2d) 589.

What we have said above applies to the second item of plaintiffs' claim for $79,597.12, representing the amount paid for which the defendant on May 16, 1911, reimbursed itself out of plaintiffs' funds for the cost of the inaccurate and

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grossly incorrect and incompetent examinations and estimates of the timber on 115,342.78 acres, of which 65,038.33 acres were subsequently sold on the basis of such estimates. The act of January 14, 1889, *supra*, provided that the plaintiffs would be charged only with the cost of making "careful, complete, and thorough examinations" by "competent and experienced examiners" which would show "with particularity the amount and quality of all pine timber" upon the lands so examined. The agreement with plaintiffs likewise so provided. These provisions were not complied with and plaintiffs' funds to that extent were wasted. The examinations and estimates, the cost of which was charged to plaintiffs, were, as denominated by the Commissioner of Indian Affairs and by Congressional committees, wholly worthless as indicating with any degree of accuracy the amount of timber on the land examined, totally unreliable and very much to the disadvantage of the Indians, and so erroneous as to convince anyone that great frauds were committed on the rights of plaintiffs.

Plaintiffs are, therefore, entitled to recover $1,277,800.74 which represents the total of the two items of the claims hereinbefore allowed in the total amount of $419,658.78 with interest at 5 percent on $340,061.66 from July 15, 1896, to date of judgment, and on $79,597.12 from May 16, 1911, to date of judgment. July 15, 1896, is used as a satisfactory equated date for the computation of interest upon the loss and damage sustained with respect to the 65,038.33 acres of timberland which were sold at public and private sale between July 1 and October 1, 1896. The record shows that a total of 32,820 acres was sold at public sale between July 1 and July 15, 1896, and that thereafter tracts aggregating 32,218.33 acres of timberland were sold at private sale on various dates between July 15 and October 1 when the new Secretary of Interior ordered that no further sales be made on the basis of the original examinations and estimates.

This leaves for consideration the defendant's claim for offsets under section 3 of the jurisdictional act. This section provides that the court shall consider and adjudicate any

claims made by the United States against plaintiffs for any payments or gratuities paid to or expended for the Chippewa Indians subsequent to January 14, 1889. We have set forth in findings 19 to 26, inclusive, the claims set up and asserted by the defendant as offsets. We are of opinion that under the provisions of the jurisdictional act and the decided cases that the offsets claimed by defendant are allowable, except those set forth and claimed in findings 19 and 20. The amount of $167,125.52 claimed by defendants as an offset under finding 19 was, we think, clearly a payment made to plaintiffs under and pursuant to an obligation assumed by defendant under the provisions of Art. III of the treaty of March 19, 1867. This amount is therefore not a proper offset. With respect to the payment of $223,162.62 made to plaintiffs as set forth in finding 20, it appears that this was the amount of compensation which Congress on June 4, 1935, determined to be due plaintiffs for obligations assumed by the United States under treaties of March 11, 1863, May 7, 1864, and March 19, 1867. That determination was made by Congress upon a claim by plaintiffs made to Congress and, in connection with the determination of that claim, the Congress, in the act of June 4, 1935, 49 Stat. 321, provided for the determination and payment from the amount allowed of compensation for plaintiffs' counsel. The amount so determined and allowed by Congress in the aforesaid act was duly appropriated in the act of June 22, 1936, 49 Stat. 1757, 1765, making appropriations for the fiscal year ending June 30, 1937. This determination and allowance by Congress was made after the jurisdictional act was enacted and, as the record now stands, we think the amount allowed and paid by Congress on the claim there made and considered cannot be treated as a gratuity and allowed as an offset. Counsel for defendant argue that this amount is recoverable under the decision in *United States* v. *Minnesota*, 270 U. S. 181, but that case was decided nearly nine years before Congress determined and allowed, and appropriated for and paid plaintiffs' claim. It must be presumed in the absence of any showing to the contrary that Congress acted in the matter with knowledge of the decision of the Supreme Court.

While in the decision in the case of *United States* v. *Minnesota*, *supra*, cited by defendant, the court held that as between the United States and Minnesota the patents to the state covering the swamp lands within these reservations could not be set aside, it does not appear that the rights of plaintiffs as between themselves and the United States under the treaties were considered and finally adjudicated. At the time the Swamp Land Act was extended to the State of Minnesota, the lands in controversy in the case cited were public lands and not within the boundary of any then existing Indian reservation. Thereafter certain lands were included within an area under the terms of a treaty between the United States and plaintiffs. At the time these treaties were made, Minnesota had not made its swamp-land selections and the decision which later held that the Swamp Land Act of 1860 operated as a grant in *praesenti* had not been rendered. Upon the record now before us, we are certainly not justified in overruling the considered action by Congress upon plaintiffs' claim for compensation for these lands which was considered, allowed, and paid by Congress with knowledge of, and nine years subsequent to, the decision in *United States* v. *Minnesota*, *supra*.

With reference to the other claims for offsets made by defendant under findings 21 to 26, inclusive, totaling $4,675,590.81, we are of opinion that the payment and gratuitous expenditures totaling this amount during the years, for the purposes, and in the amounts set forth in the findings are allowable under the opinions of this court in *Shoshone Tribe of Indians* v. *United States*, 82 C. Cls. 23, 55–59, 93, 94; *Eastern or Emigrant Cherokees* v. *United States*, 82 C. Cls. 180; *Blackfeet et al. Tribes* v. *United States*, 81 C. Cls. 101; *Crow Tribe* v. *United States*, 81 C. Cls. 238; *Klamath et al. Tribes* v. *United States*, 85 C. Cls. 451.

Counsel for plaintiffs contend in substance that expenditures for certain purposes such as education, assistance to the Indians in practical farming, for the purchase of implements for their use, for the construction and maintenance of agency buildings, for the pay and expenses of agents and other agency employees, and other similar expenditures, were all made under the established governmental Indian policy

and were primarily and principally for the benefit of the government and its citizens and only incidentally and remotely for the benefit of the Indians. It is therefore insisted that while such expenditures were not made by the government pursuant to any specific obligation assumed under any treaty or agreement, they were not wholly made for the benefit of the Indians and should not be allowed as offsets for gratuitous expenditures under the provisions of section 3 of the jurisdictional act. These contentions cannot be sustained. They were urged upon the court and rejected in *Blackfeet et al.* v. *United States*, *supra*, and the other cases cited. In the *Blackfeet* case, this court, after listing various purposes for which expenditures of the character here involved had been made, said:

> It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plaintiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed they did, to what extent.
>
> It is difficult to conceive any theory under which these expenditures did not inure directly to the benefit of the plaintiff tribes. They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs. They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover.

Upon the question of expenditures made by defendant from public funds for education in nonagency schools, the court pointed out the difference in the provisions of the jurisdictional act in the case of *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, and the *Blackfeet* case then being considered, and stated, at page 139, that:

> The court was convinced that the language of the special jurisdictional act in the above case [Fort Berthold Indians] did not embrace a set-off of gratuities, and stated that governmental Indian schools were maintained from public funds "in the nature of gratuity." In this case the special act authorizes "set-offs, or counterclaims, *including gratuities*." No such language ap-

pears in the Fort Berthold Act, and we are of the opinion that in this case it was the intent and purpose of Congress to charge the plaintiffs with all sums disbursed for their benefit over and above those provided for in treaty or other obligations. In addition to this, a supplemental report from the General Accounting Office discloses that while some of the items claimed were expended for attendance upon nonagency schools, the greater number were expended for sending children to mission, boarding, and contract schools not maintained by Government appropriations.

The same contentions that expenditures made by defendant without obligation under its long-continued Indian policy should not be considered as gratuities and offsets against any amounts determined to be due the tribe were considered and denied in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming* v. *United States*, 82 C. Cls., 23. Similar expenditures were determined and held to be proper offsets in cases subsequently considered and decided, and hereinbefore cited. The question of governmental policy in relation to Indian affairs is a matter for Congress to determine and since the jurisdictional act directs this court to determine and offset all amounts gratuitously expended for the benefit of the Indians, and, since any amounts expended from public funds for the benefit of the Indians in maintaining and carrying out that policy without obligation therefor under any treaty or agreement would be gratuities, they must be allowed as offsets under the plain terms of the jurisdictional act. Compare *United States* v. *Vassar et al.* (*License Tax Cases*), 5 Wall. 462, 469; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340; *Del Monte Mining and Milling Co.* v. *Last Chance Mining and Milling Co.*, 171 U. S. 55, 67.

Inasmuch as the total of the allowed offsets exceeds the total which plaintiffs are entitled to recover, plaintiffs are not entitled to judgment and the petition must be dismissed. It is so ordered.

WHITAKER, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

Opinion of the Court

DONALD B. TYSON v. THE UNITED STATES

[No. 45038. Decided April 1, 1940]

On Demurrer

Informer's fee; original information; recovery.—Under section 619 of the Tariff Act of 1930 a claim for the informer's fee therein provided for must be based on original information given of a fraud on the revenue or a violation of the customs law, and the information so given must lead to a recovery of the duties or a fine, penalty or forfeiture.

Same.—In a suit for recovery of informer's fee, under section 619 of the Tariff Act of 1930, the defendant is entitled to be informed by plaintiff's petition of the character of the information given.

Same; authority of Secretary of Treasury.—When the information as to fraud on the customs or a violation of the customs law, under section 619 of the Tariff Act of 1930, was the first information and when that information led to the recovery of duties or to a fine or forfeiture, then the informer was entitled as of right to the payment of the award, and if the Secretary of the Treasury arbitrarily or capriciously refused to pay such award, the informer had the right to file suit to compel that payment.

Same.—In the enactment of the Tariff Act of 1930, providing for awards to an informer as to fraud on the customs or violation of the law, it was the intention of Congress, and Congress had the power, to confer upon the Secretary of the Treasury jurisdiction to determine the facts and it could make such determination final, subject only to review by the courts to decide whether or not there was evidence to support such finding and whether or not the proceedings were regular.

Mr. Jules Chopak for the plaintiff.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Mr. Henry Fischer* was on the brief.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on demurrer to plaintiff's petition. The allegations of the petition are quite involved, but we understand them to mean: The Treasury Department asserted

claims for "customs duties, additional duties, and other statutory claims" against Alfred H. Smith Company, Inc., an importer, in the year 1932, which claims the importer agreed to settle for the sum of $80,000. Later, apparently, the matter reached the United States Customs Court, and there judgment was entered against the importer for the sum of $17,000, or $63,000 less than the amount originally agreed to be paid, which reduction, it is alleged, was procured by the fraud of the importer. It is further alleged that the plaintiff in June 1932 "furnished original information * * * respecting the failure of said importer to pay said duty," and that thereafter an additional sum of $9,000 was paid in further satisfaction of the importer's liability. The plaintiff made claim for the informer's fee provided for by section 619 of the Tariff Act of 1930 (46 Stat. 590, 758), of twenty-five per centum of the $9,000, but, it is alleged, "the defendant denied the claim of plaintiff and accordingly failed, neglected, and refused to make such payment."

The defendant demurs to this petition on the ground that it fails to state a cause of action: (1) because the character of the information furnished by plaintiff is not stated; and (2) because the Act under which plaintiff sues makes the decision of the Secretary of the Treasury on an application for an informer's fee final and conclusive.

Section 619 of the Tariff Act of 1930 (Sec. 1619, Title 19, U. S. C. A.) provides, in part:

> Any person not an officer of the United States * * * who furnishes to a district attorney, to the Secretary of the Treasury, or to any customs officer original information concerning any fraud upon the customs revenue, or a violation of the customs law or the navigation laws, perpetrated or contemplated, which * * * information leads to a recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, may be awarded and paid by the Secretary of the Treasury a compensation of 25 per centum of the net amount recovered, but not to exceed $50,000 in any case. * * *

In order to entitle an informer to the compensation provided for he must give original information of a fraud on the revenue or a violation of the customs law, and the information so given must lead to a recovery of the duties, or of

a fine, penalty, or forfeiture. Plaintiff's petition does not allege expressly that the information given by him concerned a fraud on the revenue or a violation of the customs law. His allegation is that he gave information "respecting the failure of said importer to pay said duty." Whether this information concerned hidden assets, or a fraud on the revenue, or a violation of the customs law, or just what it did concern, whether it was original information, or whether it led to the recovery of the $9,000, does not appear. The defendant is entitled to be informed by plaintiff's petition of the character of the information given, and this is not done. For this reason, if for no other, the demurrer should be sustained.

But for another and more important reason it should be sustained. The Act says that a person furnishing information concerning a fraud on the revenue or a violation of the customs law, which information leads to a recovery of duties, or of a fine, penalty or forfeiture on account of the fraud or violation, "may be awarded and paid by the Secretary of the Treasury" a fixed compensation. The defendant says that the Secretary's action in refusing to pay the award is final and conclusive, and that this court has no jurisdiction to review it. We do not altogether agree. Under certain circumstances and to a certain extent we think his action may be reviewed by the courts. Congress did not intend to leave to the caprice or whim of the Secretary an informer's right to the award. It intended to confer upon the informer an absolute right to demand the payment of the award when he had met the conditions precedent thereto laid down by Congress; that is to say, when he had furnished information of a fraud on the revenue, or a violation of the customs law, and when that information was "original" information thereof, and when that information led to the recovery of duties, or of a fine, penalty, or forfeiture. If the information furnished was not the first information which the Secretary of the Treasury had had concerning the fraud or violation, the informer was not entitled to the fee. If the information furnished did not lead to a recovery of duties, or of any fine, penalty, or forfeiture, the informer was not entitled to a fee. But when the information was the first information which the Secretary had had, and when that information led to

the recovery of duties, or of a fine, penalty, or forfeiture, then the informer was entitled as of right to the payment of the award, and if the Secretary of the Treasury arbitrarily or capriciously refused to pay it, the informer had the right to file suit in court to compel that payment. *G. Alexander Ramsey* v. *United States*, 14 Ct. Cls. 367; *Sarah E. Ramsey et al.* v. *United States*, 21 Ct. Cls. 450; aff. 120 U. S. 214; *United States* v. *Laughlin*, 52 Ct. Cls. 292; 249 U. S. 440. This is a Government of laws, not of men.

In the case of *United States* v. *Laughlin*, 249 U. S. 440, 442, 443, the court had under consideration the proper construction of section 2 of the Act of March 26, 1908, which reads:

> That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public-land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

The defendant insisted that a favorable decision by the Secretary was a condition precedent to the right of recovery under this section. The court, however, rejected this construction, saying:

> We cannot accept this construction of § 2 of the Act of 1908. According to it, although facts were made to appear to the entire satisfaction of the Secretary showing that a person had made "payments to the United States under the public-land laws in excess of the amount he was lawfully required to pay under such laws," it would rest in the uncontrolled judgment and discretion of the Secretary to deny repayment of the excess because not satisfied that it ought to be repaid, notwithstanding Congress had declared that under the precise state of facts it should be repaid. Under this construction the legislative power would in effect be delegated to the Secretary. In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment, en-

titling claimant to repayment under the Act of 1908, was a matter properly within the jurisdiction of the Court of Claims. See *Medbury* v. *United States*, 173 U. S. 492, 497–498; *McLean* v. *United States*, 226 U. S. 374, 378; *United States* v. *Hvoslef*, 237 U. S. 1, 10.

The question in *Sarah E. Ramsey, et al.* v. *United States*, *supra*, was whether the Secretary's action on an informer's right to the fee was final and conclusive. We held there that it was subject to review by this Court, except on questions of fact. We were affirmed by the Supreme Court.

In the case before us, as in the *Laughlin* and *Ramsey* cases, *supra*, we think Congress intended that the determination of the facts set out by Congress as a prerequisite to the right to claim the award should be committed to the Secretary of the Treasury. The Act reads: "Any person not an officer of the United States" who does certain things "may be awarded and paid by the Secretary of the Treasury" a fixed compensation. Since, undoubtedly, by the expression, "may be awarded and paid by the Secretary of the Treasury," Congress did not mean to leave its payment to his "uncontrolled judgment or discretion," it must have meant thereby to give to the Secretary jurisdiction to determine what the facts actually were which were alleged in support of the claim. Certainly some authority was intended to be conferred on him, and that authority must have been to determine the facts, because no other authority could have been constitutionally conferred. Congress could not have intended to confer upon him the right to determine questions of law, because this is the exclusive province of the courts. *United States* v. *Laughlin*, *Sarah E. Ramsey* v. *United States*, *supra*. But it could confer on him jurisdiction to determine the facts, and it could make such determination final and conclusive, subject only to review by the courts to determine whether or not there was any evidence to support his finding or whether or not the proceedings were regular. *Phillips* v. *Commissioner*, 283 U. S., 589, 600, and cases there cited. Compare *Morgan, et al.* v. *United States*, 304 U. S. 1.

If the Secretary's determination against the claim was supported by no evidence, if it was arbitrary or capricious, or if the proceedings were fatally defective, because, for instance, no opportunity for a hearing had been given the plaintiff,

we think a suit would lie in this court to review his determination and to recover the award; but, on the other hand, if there was any evidence to support his finding, and if the proceedings were regular, his findings would be final and conclusive.

The allegations of plaintiff's petition are that he made claim for the award and that "the defendant denied the claim" and "failed, neglected and refused to make such payment." Why the Secretary denied it is not alleged. Nothing is alleged to bring the case within our jurisdiction.

It results that the defendant's demurrer must be sustained, and the plaintiff's petition dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice,* concur.

WILLIAMS, *Judge,* took no part in the decision of this case.

J. I. CASE COMPANY (FORMERLY CALLED J. I. CASE THRESHING MACHINE COMPANY) v. THE UNITED STATES

[No. 42772. Decided May 6, 1940]

On the Proofs

Income tax; inclusion of amount accrued for State income tax but not paid.—Where plaintiff, a Wisconsin corporation, which kept its books on an accrual basis, deducted in its Federal income tax return for 1926 its liability for income taxes for 1926 imposed by the Wisconsin income-tax law of 1925, and where in the year 1927, and before the State income tax was paid, the Wisconsin law was amended, the provision for the levy against 1926 income being repealed, and a tax was levied on two-thirds of plaintiff's income for 1926 and one-third of its income for 1927, payable in 1928, it is held that the action of the Commissioner in including in plaintiff's 1927 income the amount accrued for the 1926 State income tax, which was never paid, was proper.

Same; liability extinguished by repeal.—Plaintiff's deduction from its 1926 income of its liability for State income taxes, then existing, was proper, but this liability was extinguished by the Wisconsin 1927 Act and having been extinguished it was properly added to plaintiff's income in the year in which extinguished.

Reporter's Statement of the Case

Same; capital expenditure.—Where plaintiff entered into an agreement with a competitor corporation by which said competitor agreed to discontinue the use of certain names and initials on its products and in its advertising, which names and initials were similar to names and initials in use by plaintiff and which similarity had caused confusion and expense, it is held that the sum paid by plaintiff to induce said competitor to surrender its right to the use of said names and initials was a capital expenditure.

Same.—The benefits incident to the elimination of the use by competitor of certain names and initials, which use was a business but not a legal nuisance, were benefits to be enjoyed not only during the year in which acquired but were of a permanent nature and the sum expended therefor should not be charged against the income of only one year.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. J. Marvin Haynes, Clark M. Robertson,* and *Robert H. Montgomery* were on the brief.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office at 700 State Street, Racine, Wisconsin. On May 31, 1929, plaintiff's name was changed from J. I. Case Threshing Machine Company to J. I. Case Company.

2. The Commissioner of Internal Revenue made examinations and audits of plaintiff's income-tax returns for 1927 and 1928 and determined and collected the following additional taxes on the dates and for the years indicated below:

Year:	*Date of payment*	*Amount of additional tax*
1927	May 16, 1931	$36,860.94
1928	May 16, 1931	116,893.42

3. On June 4, 1932, and May 26, 1932, plaintiff duly filed claims for refund for said years in the amounts of $25,871.99 and $84,180.00, respectively.

The Commissioner of Internal Revenue rejected the claims on September 14, 1932.

4. The plaintiff's books of account were kept on an accrual basis and all tax returns have been prepared on that basis.

Income tax for 1927

5. The claim for refund for 1927 alleges that the Commissioner of Internal Revenue erroneously included in plaintiff's taxable income for that year the sum of $173,684.28 accrued as a liability for Wisconsin State income taxes on plaintiff's books as of December 31, 1926, but not paid during 1927 because of a change during that year in the State income-tax law.

6. As of December 31, 1926, the plaintiff accrued Wisconsin income taxes of $173,684.28 on its books, and deducted that amount in its Federal income-tax return for 1926. This action was approved by the Commissioner of Internal Revenue. As of December 31, 1927, the plaintiff accrued Wisconsin income taxes of $190,821.09 on its books and deducted that amount in its Federal income-tax return for the year 1927. On the audit of this return by the Commissioner of Internal Revenue the amount of $173,684.28 deducted in the 1926 return was added to plaintiff's 1927 income, and plaintiff was allowed approximately the sum of $190,821.09 on account of Wisconsin income taxes accrued for the year 1927.

7. The foregoing 1926 accrual of $173,684.28 was computed by the plaintiff under the Wisconsin income tax law for 1925, which was in full force and effect for the year 1926, but this amount was not paid by the plaintiff because of an amendment of the 1925 Act by the Act of 1927. However, payment of $184,916.67 was made in 1928 and payment of $185,363.39 was made in 1929, the computation of both of which amounts under the 1927 Act is set forth in the tabulations below. The tax paid in 1928 was computed as follows:

Two-thirds of the 1926 income (⅔×$2,536,919.21), or	$1,691,279.48
was added to one-third of the 1927 income (⅓×$2,859,698.49), or	953,232.83
making a total of	2,644,512.31
on which an income tax was paid in 1928 to the State of Wisconsin in the amount of	184,916.67

The tax paid in 1929 was computed as follows:

One-third of the 1926 income (⅓×$2,536,919.21), or	$845,639.73
was added to one-third of the 1927 income (⅓×$2,859,698.49), or	953,232.83
and to one-third of the 1928 income (⅓×$2,556,063.50), or	852,021.17
making a total of	2,650,893.73
on which an income tax was paid in 1929 to the State of Wisconsin in the amount of	185,363.39

8. The Wisconsin Income Tax Act (Wisconsin Statutes, 1925, chapter 71) was amended by Laws of Wisconsin, 1927, chapter 539 (approved August 10, 1927, published August 17, 1927, effective on publication), to provide for a tax assessable and payable in each year upon the "taxable income" of each taxpayer, determined "by averaging the net income or loss reported by the taxpayer on his current return with the net incomes or losses for the two previous years, except that the taxable income assessed in the year 1928 shall be the average of the net incomes or losses for the years 1926 and 1927 or for the corresponding two fiscal years" (Section 71.10).

9. The Wisconsin Income Tax Act, as amended, was further amended by Laws of Wisconsin, 1928, chapter 4, (approved February 1, 1928, published February 2, 1928, effective on publication) so as to provide that in the determination of the taxable income to be assessed in 1928 "the net income or loss of 1926 shall be given two-thirds weight and the net income or loss of 1927 one-third weight."

Income tax for 1928

10. During the year 1928 plaintiff paid to the Massey-Harris Company, Ltd., of Canada, which had recently acquired the J. I. Case Plow Works Company, Inc., $700,000 in order to have that company discontinue the use of the name "Case" or "J. I. Case," and the initials "J. I. C." The situation necessitating the payment of this sum is detailed hereinafter .

In its Federal income-tax return for 1928 plaintiff deducted this $700,000 as an expense. The Commissioner of Internal Revenue held that this was a capital expenditure,

disallowed the deduction, and assessed on that account an additional tax of $84,000 against the plaintiff for that year, which was a part of the additional tax paid by plaintiff for the year of 1928 as shown in finding 2.

On May 26, 1932, plaintiff filed its claim for refund for the year 1928. The reasons given in support of this claim read, in part, as follows:

> Some of the inconveniences suffered by the taxpayer and its customers because of this situation are as follows:
>
> 1. The similarity in names resulted in mistakes in addressing and handling mail, remittances, and papers of all kinds by suppliers, customers, and others doing business with both companies to such an extent as to hamper the business of the taxpayer. Notwithstanding much educational effort the public never seemed to understand or remember the existence of the two separate companies—what stood out in both names was the word "Case" or "J. I. Case" and a great deal of mail came in these names without being clearly addressed to either company, resulting in the mail having to be opened jointly. Over ninety percent of this mail was intended for the taxpayer and the joint opening of mail resulted in delay and the exposure of its contents to a competitor. These conditions not only existed at Racine, Wisconsin, where the companies were located side by side, but also at branch-house points throughout the United States and Canada.
>
> 2. The J. I. Case Plow Works, Inc., was from time to time in financial difficulties necessitating reorganizations which caused a great amount of unfavorable publicity in trade papers and implement and financial journals. Because of the similarity of names it affected the credit of the taxpayer to some extent and also produced an unfavorable effect on prospective purchasers of the taxpayer's implements and machinery.
>
> 3. Confusion also existed in the minds of the stockholders and investing public. Instances are known where investors purchased the stock of the competitor company thinking they were acquiring the stock of the taxpayer.

11. The J. I. Case Threshing Machine Company was founded by Jerome I. Case in 1842. It was incorporated in 1880 under the name of J. I. Case Threshing Machine Company and continued under that name until May 31, 1929,

when its name was changed to J. I. Case Company. The plaintiff during the time involved was the third largest farm machinery manufacturer in the United States. The assets ranged between $30,000,000 and $40,000,000. The sales ranged between $15,000,000 and $35,000,000, depending on the conditions in the agricultural districts. The plaintiff had its main office and three factories in Racine, Wisconsin, one factory in Rockford, Illinois, and one factory in Dixon, Illinois. The plaintiff had about forty-three branches and sub-branches in the United States and foreign countries, and in those foreign countries where the plaintiff did not maintain a branch, it had representatives.

12. The J. I. Case Plow Works Company was originally established on November 22, 1876, by the said Jerome I. Case and two or three other persons under the name of Case, Whiting & Company. This company immediately began manufacturing plows on a large scale, both walking plows and sulky plows, as well as harrows, cultivators, and tillage machinery of a similar nature. In 1878 the name of the company was changed to J. I. Case Plow Company. In 1884 or 1885 the company went through bankruptcy proceedings, Jerome I. Case buying the assets. After the purchase of the assets he organized a corporation under the laws of Wisconsin on September 14, 1885, by the name of J. I. Case Plow Works Company. This corporation continued under that name as a Wisconsin corporation until July 29, 1919, when the J. I. Case Plow Works Company and the Wallis Tractor Company merged to form J. I. Case Plow Works Company of Delaware. The company continued as the J. I. Case Plow Works Company until August 3, 1925, when, as a result of serious financial difficulties, it reorganized as J. I. Case Plow Works Company, Inc. After the merger of J. I. Case Plow Works Company with Wallis Tractor Company, the business of the company substantially declined and it met with financial reverses which ultimately resulted in its being placed in the hands of its creditors and in its sale in 1928 to Massey-Harris Company, Ltd., of Canada, the largest farm machinery company in Canada.

The J. I. Case Plow Works Company, which was also located at Racine, Wisconsin, was a smaller company than

plaintiff. The assets of the Plow Works Company from 1920 to 1923 were between $14,000,000 and $17,000,000 and for the years 1925 to 1927 were between $3,000,000 and $4,000,000. The Plow Works Company did business primarily in the Mississippi Valley and west of the Mississippi River.

13. From the dates of the establishment of the two "Case" companies heretofore referred to, Jerome I. Case was the operating head of both companies until his death in 1891. The two companies continued under the same management until 1897, when the ownership of the plaintiff was purchased by a syndicate, and from that time on the ownership and management of the two companies were in entirely different hands.

14. Plaintiff's business originally consisted of the manufacture and sale of threshing machines operated by horsepower. The steam engine displaced the horsepower, and then later the internal-combustion motor tractor displaced the steam engine. Plaintiff added other lines of manufacture such as road machinery, traction engines, and automobiles. All this machinery was known to the trade as "Case" machinery. Shortly after 1912 plaintiff had developed a large business in the sale of tractor-drawn plows. Prior to 1919 plaintiff's plows were manufactured by the Grand Detour Plow Company. In 1919 plaintiff purchased that company. The plows both then and since were produced and sold under the trade name and trade-mark of "Grand Detour," but were advertised to some extent as "Case" plows.

15. When the plaintiff company was taken over by the syndicate in 1897 confusion developed between the J. I. Case Plow Works and plaintiff because of the similarity in the names of the companies.

In 1911 plaintiff took preliminary steps toward changing its name to J. I. Case Company. The officers of the Plow Works Company learned of this action and at once caused to be organized a number of new corporations called the J. I. Case Company, and undertook to have all mail addressed to J. I. Case Company delivered to it.

16. About 1912 the Plow Works Company brought an action in the Wisconsin State Courts against the plaintiff to

enjoin the latter from using the name "Case" or "J. I. Case" on or in connection with its plows. This case was finally determined by the Supreme Court of Wisconsin (162 Wis. 185) in the year 1916. The injunction asked for was granted, and the court ordered that all misdirected mail received at the Racine Post Office was to be delivered to the plaintiff and opened by it in the presence of a representative of the J. I. Case Plow Works Company at the hours of 10 a. m. and 2: 30 p. m. daily except Sundays and holidays. The procedure as to misdirected mail was the same in other cities where both companies had branch offices. Annually there were between four and five thousand incorrectly addressed letters received at Racine, the great bulk of which was intended for plaintiff. Confusion existed also as to misdirected express and freight shipments, and to messages, orders, remittances, and checks. Salesmen on the road had to devote time in explaining the difference between the two companies. The financial reverses of the Plow Works Company embarrassed plaintiff with the banks and the suppliers of raw materials.

17. Because of the similarity of names, difficulties arose in every line of activity of the plaintiff, causing trouble, confusion, and expense. Special advertising directed toward clearing up the confusion was estimated to amount to $10,000 a year, legal expenses attributable to this confusion, at $1,500 a year, and extra salaries and commissions to clarify matters, at $5,000 a year. Other expenses were incurred, but no basis for estimating them was established by the proof.

18. Between 1924 and 1928 the J. I. Case Plow Works Company, Inc., became financially involved and came under the control and direction of a group of bankers who undertook to sell the business to plaintiff, offering to take around $2,000,000 therefor. The offer was rejected.

19. Sometime in 1927 plaintiff learned that the Massey-Harris Company, doing extensive business in farm implements both in Canada and the United States and also internationally, had obtained an option to purchase the entire business of the Plow Works Company. The Massey-Harris Company was much larger and more powerful than the Plow Works Company and plaintiff feared that the previous

confusion between it and the Plow Works Company would be greatly increased if the Massey-Harris Company should acquire the Plow Works Company. Accordingly, the plaintiff began negotiations with the Massey-Harris Company to induce them to discontinue the use of the word "Case" or "J. I. Case" or "J. I. C." on the products of the Case Plow Works Company. The Massey-Harris Company, however, refused to enter into negotiations for this purpose until after it should have acquired, if ever, the Plow Works Company.

20. In March 1928 the Massey-Harris Company purchased the entire business of the J. I. Case Plow Works Company, Inc., for $1,262,500 in cash, and assumed the bonds of that company in the amount of $1,029,000.

After the purchase was consummated, the Massey-Harris Company organized a new corporation named J. I. Case Plow Works Company, Inc., of Maryland, to conduct the newly acquired business.

In May 1928 the Massey-Harris Company approached plaintiff offering to surrender its right to the use of the names "Case," "J. I. Case," or the initials "J. I. C." for the sum of $1,000,000. The parties finally agreed upon the payment of $700,000, the terms of the agreement being incorporated in an offer by plaintiff, later accepted by the Massey-Harris Company, the pertinent provisions of which read as follows:

* * * * *

1. That you cause the corporate name of the J. I. Case Plow Works, Inc., a corporation organized under the laws of the State of Maryland, U. S. A., with its principal place of business at the City of Racine, Wisconsin, to be changed to Massey-Harris Company, or some similar name which shall eliminate the name "J. I. Case" or "Case" from the corporate title of said company.

2. That you will cause the records of the Secretary of State of Wisconsin to be changed so that the authorization to the said Plow Works to do business in said State shall be cancelled or withdrawn and the corporation with the name so changed be authorized to do business in said State in place and stead of said J. I. Case Plow Works, Inc.

3. That you will cause changes similar to those hereinabove stated in paragraph 2 to be made in each and every state within the United States in which said Plow Works is now authorized to do business.

4. That when the said corporate name of the said Plow Works is so changed as hereinbefore provided, that no subsequent change in the name of said company shall be made which shall incorporate the name "Case" or "J. I. Case" as part of its title and that no new company within the United States or elsewhere shall be organized by you or by any person or persons acting in your behalf with the corporate title including the name "Case" or "J. I. Case."

5. That you will assign or cause to be assigned to the said J. I. Case Threshing Machine Company or its nominee or nominees, all of the capital stock now issued to or owned by the said Plow Works or its stockholders in the J. I. Case Company, a Wisconsin corporation, the J. I. Case Company organized under the laws of the Province of Ontario, and the capital stock of any other corporation bearing the name "Case" or "J. I. Case" wherever situated, not, however, including said Plow Works.

* * * * *

6. That you will assign, transfer, and set over unto us all your right, title, and interest in and to all copyrights, trade names, and trade-marks owned and/or used by said Plow Works, which shall include the name "Case," "J. I. Case," or the initials "J. I. C.," whether or not the same have been registered or used within the United States or in foreign countries, but this shall not prevent the Plow Works from continuing the use of descriptive or other words contained in any such copyright, trade-mark, or trade name, after having eliminated the name "Case," "J. I. Case," or "J. I. C."

* * * * *

8. That all printed matter bearing the name "Case" or "J. I. Case" in connection with implements or the product of the Plow Works, also all electrotypes, dies, stationery, contracts, bill-heads, and other similar stationery or printed documents bearing said name, and all advertisements and advertising matter bearing said name or names, shall be discontinued in the use of the business of the Plow Works as soon as reasonably possible and in any event not later than December 31, 1928.

* * * * *

13. Upon the change of name of the Plow Works becoming effective as above provided and upon the payment by the undersigned as herein provided, the Plow Works shall, at our request, consent to a modification, in accordance with the terms of this agreement, of the decree or judgment heretofore rendered in the case of *J. I. Case Plow Works Company* v. *J. I. Case Threshing Machine Company*, insofar as it relates to the use by the undersigned of the name "Case" or "J. I. Case" on implements theretofore manufactured by the Plow Works, and on and after June 1, 1929, the Plow Works shall at our request consent to the modification, in accordance with the terms of this agreement, of said judgment or decree with respect to the so-called "mis-directed mail."

* * * * *

15. In consideration of your accepting this offer, we hereby agree to pay to you the sum of Seven hundred thousand Dollars ($700,000). This payment shall be made to you or to your nominee upon your having carried out or caused to be carried out the provisions as set out in the above paragraphs numbered 1, 2, 3, and 5.

16. Upon the completion of the agreements contained in paragraphs numbered 1, 2, 3, 5, and 15, we shall be entitled to use the name "J. I. Case," and/or "Case," and/or the initials "J. I. C." on any and all implements, on or in connection with which the Plow Works or its predecessors had the exclusive right of use, whether made by us or for us.

* * * * *

21. On August 8, 1928, the plaintiff paid the Massey-Harris Company the $700,000 specified in the contract referred to in the preceding finding.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

There is involved in this case the plaintiff's income-tax liability for the year 1927 and for the year 1928.

First, with respect to its liability for 1927. The plaintiff, which kept its books on an accrual basis, deducted in its Federal income-tax return for 1926 its liability for income taxes for 1926 as imposed by the Wisconsin income-tax law of 1925,

amounting to $173,684.28. In the year 1927, and before this tax was paid, the law was amended, the provision for the levy against 1926 income was repealed, and a tax was levied on two-thirds of plaintiff's income for 1926 and one-third of its income for 1927. This tax was payable in the following year, 1928.

The Commissioner of Internal Revenue allowed the deduction for 1926, but added the amount thereof to plaintiff's 1927 income, and permitted a deduction therefrom of the tax levied by the 1927 Act. The amount the plaintiff deducted on this account amounted to $190,821.09, but upon an audit it was determined that its correct liability was $184,916.67. This amount was paid in 1928. No amount was paid on account of the tax levied by the 1925 Act.

Plaintiff correctly deducted from its 1926 income its liability for Wisconsin income taxes imposed by the Act of 1925, because this liability existed at the close of the year. It was a proper deduction when taken. The Government, however, says that this liability was extinguished by the Wisconsin 1927 Act, and having been extinguished, it should be added to its income in the year in which extinguished. The plaintiff replies that its liability was not extinguished, but that the date for the payment of the liability was merely postponed. It insists that its 1926 income was not relieved from liability for taxes because two-thirds of it was taxed in ascertaining its income-tax liability for 1927, and one-third of it was taxed in ascertaining its income-tax liability for 1928.

It is quite true that plaintiff's 1926 income has been subjected to tax, but it does not follow that the liability for which the deduction of $173,684.28 was taken in 1926 was not extinguished. The 1925 Act levied a tax on plaintiff's 1926 income; the 1927 Act extinguished this liability and levied a tax for the year 1927, measured by two-thirds of plaintiff's 1926 income and one-third of its 1927 income. This was a liability entirely separate and distinct from the liability for which the deduction of $173,684.28 was taken in 1926. A deduction was taken for the liability imposed by the Act of 1927 in the amount of $190,821.09. This deduction the plaintiff was entitled to because it was liable for the payment of this amount, but it was no longer liable for the amount

deducted in 1926, $173,684.28, and, therefore, this amount should be added to its income in the year in which its liability for it was extinguished. No amount has ever been paid or ever will be paid by plaintiff on account of this deduction of $173,684.28. The liability imposed by the Act of 1927 is the only liability plaintiff was under thereafter, and this deduction has been allowed. The plaintiff has therefore been given the benefit of the deduction to which it was entitled under the Act of 1925, as amended by the Act of 1927.

Section 27 of the Wisconsin Income Tax Act of 1927 provided:

> The usual income-tax assessment and tax rolls as provided in chapter 71 of the statutes of 1925 shall not be prepared or certified during the year 1927 and the principal assessment and tax rolls issued under the provisions of chapter 71 of the statutes as amended by this act shall be issued on June 1, 1928. * * *

It will thus be seen that the Act expressly provides that the tax levied for the year 1926 by the Act of 1925 was abated. It seems to us to make no difference that the 1927 Act provided that the tax levied should "apply to incomes received in the years 1926 and 1927 * * *." It is true it applied to 1926 income in part, but the liability created by the Act of 1925, for which the deduction was taken, was expressly extinguished. This liability having been extinguished in 1927, the Commissioner of Internal Revenue properly added it to plaintiff's income for 1927. *Walker* v. *Commissioner*, 88 F. (2d) 170; *Lakeland Grocery Co.* v. *Commissioner*, 36 B. T. A. 289. Cf. *Maryland Casualty Co.* v. *United States*, 52 Ct. Cls. 201; 251 U. S. 342; *United States* v. *Kirby Lumber Co.*, 71 Ct. Cls. 290; 284 U. S. 1; *Commissioner* v. *Simmons Gin Co.*, 43 F. (2d) 327.

Next, with respect to its 1928 income. In the year 1928 the plaintiff paid to the Massey-Harris Company the sum of $700,000 in consideration of the promise of that company to discontinue the use of the names "J. I. Case," or "Case," or the initials "J. I. C." on the products of the J. I. Case Plow Works Company, Inc., which company the Massey-

Harris Company had recently acquired. The plaintiff seeks to deduct this amount as an expense; the Commissioner says it is a capital expenditure.

The facts which induced the plaintiff to enter into this agreement with the Massey-Harris Company are fully set out in the findings of fact. Briefly summarized, they are as follows:

The plaintiff and the Plow Works Company had adjoining plants in the city of Racine, Wisconsin, and each had branch offices in other cities. Until 1897 both companies had been controlled by the same people, but in that year the control of the plaintiff passed to others. Almost immediately friction arose between the two companies due to the similarity in their names and the proximity of their locations, and due to the fact that both companies used the name "Case," or "J. I. Case," or the initials "J. I. C." on some or all of their products. Mail intended for the plaintiff was frequently by inadvertence addressed to the Plow Works Company, and vice versa. Likewise, express and freight were improperly addressed.

The plaintiff manufactured chiefly heavy farm machinery, but also manufactured farm implements which competed with the products of the Plow Works Company. Plaintiff's plows were sold under the name of "Grand Detour," but they had stamped on them that they were manufactured by the J. I. Case Threshing Machine Company. Naturally, salesmen undertaking to sell plows or other machinery for the Threshing Machine Company were benefited by the good-will which attached to the Plow Works Company, and vice versa. A prospective purchaser approached by a salesman of the Plow Works Company might buy the plows of that company believing them to be the products of the Threshing Machine Company, and the Threshing Machine Company would thereby lose a sale; or, the reverse.

This friction finally culminated in a suit between the parties, which resulted in a final decree enjoining the plaintiff from using the words "J. I. Case," or "Case," or the initials "J. I. C." on any of its plows, unless at the same time it

stated that they were not the products of the Plow Works Company. Later, the Plow Works Company got into serious financial difficulties and proposed to plaintiff to sell its assets to it, but this plaintiff refused to consider until the plaintiff learned that the Massey-Harris Company was about to purchase the Plow Works Company. Since Massey-Harris Company was a large, progressive concern, plaintiff feared the competition it would have to meet, especially if the Massey-Harris Company had the right to sell its products under the name of "Case." Accordingly, plaintiff entered into negotiations with that company to induce it to surrender its right to the use of the name "Case," which resulted in plaintiff's payment to them of $700,000 therefor.

The plaintiff insists that it acquired nothing that it didn't already have by the agreement of the Massey-Harris Company to surrender its right to use this name, and that, therefore, it cannot be a capital expenditure; but that, on the other hand, it paid this sum only to eliminate the confusion and nuisance previously existing, and that, therefore, it was a business expense.

We are of the opinion that the plaintiff by the expenditure acquired a capital asset. Prior to the agreement the plaintiff did not have the sole right to the use of this name on farm products; it had this right in conjunction with the Plow Works Company. After the agreement it had this right to the exclusion of the Plow Works Company and its successor, the Massey-Harris Company. The good-will attached to the use of this name by the plaintiff was impaired by the right of the Plow Works Company also to use it. After the agreement the value of this good-will was necessarily increased because the thing that had impaired its value had been removed.

It is not proper to say that plaintiff paid this amount to remove a nuisance. In a loose sense of the word the Plow Works Company's right to use the name was a nuisance to plaintiff, but it was not a nuisance in the legal sense of that word. The Plow Works Company's use of it was a legal use, and, therefore, not a nuisance. This legal right it surrendered in consideration of the $700,000.

The benefits incident to the elimination of the right of the Plow Works Company to the use of this name were not benefits to be enjoyed only during the year in which acquired, but were of a permanent nature and should not be charged against the income of only one year.

The plaintiff cites a number of decisions of the Board of Tax Appeals in support of its position. We do not undertake to distinguish them because we think the decision of the Board in *Clark Thread Company* v. *Commissioner*, 28 B. T. A. 1129, which was later affirmed by the Circuit Court of Appeals for the Third Circuit in 100 F. (2d) 257, is in entire agreement with the opinion here expressed.

The facts in the *Clark Thread Company* case, *supra*, are almost identical with those at bar. The Clark Thread Company paid the sum of $525,000 in order to induce the Blodgett & Orswell Company, a competitor, to discontinue the sale of thread under the names of "John J. Clark" or "Clark" in any form. The Board of Tax Appeals held that the amount was paid in order to eliminate competition, citing and quoting from the opinion of the Circuit Court of Appeals for the Third Circuit in *Newspaper Printing Co.* v. *Commissioner*, 56 F. (2d) 125. The Circuit Court of Appeals in that case, among other things, said:

> That the cost of eliminating competition is a capital asset has been established by a long line of decisions of the Board of Tax Appeals.

The payment of the $700,000 to the Massey-Harris Company was made to them to eliminate their right to compete in the sale of farm machinery through the use of the name "Case."

A different situation was presented in the case of *Bliss* v. *Commissioner*, 57 F. (2d) 984, cited by the plaintiff. The amount paid in that case was paid in order to get rid of a trespasser who was asserting an invalid claim. By the payment the taxpayer acquired nothing that he did not already have. In this case prior to the payment the plaintiff had the right to the use of the name "Case" in common with the Plow Works Company. After the payment it had the right to the use of this name to the exclusion of the

Plow Works Company, and, therefore, it did acquire something which it had not formerly had.

We are of the opinion that the $700,000 was a capital expenditure, and not an ordinary and necessary expense of doing business.

It results that plaintiff's petition must be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice,* concur.

BENNINGTON COUNTY SAVINGS BANK v. THE UNITED STATES

[No. 42832. Decided May 6, 1940]

On the Proofs

Flood control; taking of private property.—Decided on the authority of *United States* v. *Sponenbarger et al.*, 308 U. S. 256; and *Danforth* v. *United States*, 308 U. S. 271.

The Reporter's statement of the case:

Mr. Bailey Springston for the plaintiff. *Mr. J. O. Modisette, Mr. W. H. Adams, Mr. Thomas M. Wade, Jr.*, and *Mr. George B. Springston* were on the brief.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff sues to recover $15,000 with interest as just compensation for the alleged taking by the defendant of 497 acres of land by the construction of a certain levee along the Mississippi River in the State of Louisiana, as more fully set forth in the findings.

The defendant denies that the construction of the levee in question constituted a taking of plaintiff's property within the meaning of the Fifth Amendment, and asks that the petition be dismissed.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Bennington County Savings Bank, a corporation of the State of Vermont, and plaintiff herein, is the owner of 497

acres of land in the parish of East Carroll, State of Louisiana, known as the "Stewartdale Plantation," situated on the right bank of the Mississippi River.

2. Stewartdale Plantation, with the exception of a small strip at the north end, is part of a larger area that is now entirely surrounded by levees, and became so surrounded in the manner hereinafter set forth. The area thus inclosed consists of about 10,000 acres, is known as "Bunches Bend," has a highly productive soil, and many years ago was the garden spot of East Carroll Parish. Bunches Bend has been cultivated largely by tenants in recent years, the improvements in the territory are neither expensive nor extensive, the roads are poor, and it is not serviced by telephone or electric power.

Bunches Bend is roughly tongue-shaped, extending into what was probably in times past a bend in the Mississippi River, the river still skirting one side of the territory. An old bed of the river borders the upper or northernmost portion, and the lower western side is now bounded by what is known as the Wilson Point New Levee.

3. There had been in existence for some years prior to construction of the Wilson Point New Levee, a levee (hereinafter termed the "old levee"), extending along the right bank of the Mississippi River for many miles and passing along the boundary of Bunches Bend except where Wilson Point New Levee is now located. The old levee had been built up to the standard grade and section established in 1914, and the amount of protection afforded Bunches Bend from flood waters of the Mississippi was governed by the 1914 grade and section. This old levee has been sufficient for many years to protect Bunches Bend from the ravages of high water, and the levee on its boundary, as built to the 1914 grade and section, has been maintained and has never crevassed.

4. The old levee runs about 15 statute miles around Bunches Bend. Along the center line of Bunches Bend is a drainage ditch or canal, called Jack Falls Drainage Canal. This canal originates in the upper or northern end of Bunches Bend, and before the construction of the Wilson Point New Levee it terminated and emptied some distance beyond in

Lake Providence. There were other and minor drainage ditches in Bunches Bend, more particularly in the southernmost portion. This drainage system served as a run-off for waters that would otherwise accumulate on the land, especially water from rains, and to a minor extent water seeping from the river through or under the levee due to the pressure of high water. The land generally was subject to regular seepage from the Mississippi River when the river rose against the levee, and the seepage at that time being from an unlimited source, though never in excess of a height determined by the head of water in the river, could not be ultimately drained off until the flood abated. The system of drainage ditches in Bunches Bend in fact served mainly to rid the land of excess rain water.

5. Beginning in 1931 the United States Government constructed the Wilson Point New Levee in practically a straight line from station 521+40 at the old levee to station 1317 at the old levee, a distance of about three and one-half miles on the new levee, leaving Jack Falls Drainage Canal open temporarily. The tie-in of the old and new levees at the south end, being at station 1317 on the old and station 714+28.6 on the new levee, was accomplished about October 31, 1931. The defendant closed Jack Falls Drainage Canal July 31, 1934. The old and the new levees were tied in at the north end, being station 521+40 on both levees, on about October 2, 1934.

6. The Wilson Point New Levee was built to the grade and section standardized in 1928, which was about 3½ feet higher than the 1914 grade and section, with proportionately wider base. At the same time the old levee above and below the Wilson Point New Levee, previously of the 1914 grade and section, was, with the exception of that portion extending around Bunches Bend, raised and enlarged to the 1928 grade and section, so that thereafter the Wilson Point New Levee formed a part of a uniform levee higher and larger than that around the remaining boundary of Bunches Bend, thus affording added protection to Stewartdale Plantation against possible flood waters that might thereafter find their way into this area from the west, due

to a crevasse in the river-front levee upstream or downstream, while not impairing or detracting in any way from the levee protection against flood waters from the main stem of the river afforded by the old levee by the 1914 grade and section surrounding Bunches Bend. Bunches Bend is accordingly protected from the river only by a levee of 1914 grade and section, rather than by a levee of 1928 grade and section.

7. Stewartdale Plantation is situated some distance to the east of Wilson Point New Levee and to the north of Jack Falls Drainage Canal. The river front or old levee forms the northern boundary of this plantation. In the construction of the Wilson Point New Levee, borrow pits were dug immediately to the eastward of the levee and between it and the said plantation. These borrow pits extended throughout the whole length of the new levee and terminated at the southern part of the Bunches Bend area where the new levee ties in to the old levee. Where formerly Jack Falls Drainage Canal had for its outlet Lake Providence, the seep and rain water from Stewartdale Plantation now flows into Jack Falls Drainage Canal and passes thence into the borrow pits and finally into a pond at the southern extremity of Bunches Bend area some two miles south of the southern boundary of said plantation. The water collected in the borrow pits and pond is disposed of by evaporation or by percolation back into the main river.

8. Neither the diversion of Jack Falls Drainage Canal into these borrow pits, due to its intersection by the new levee, nor the construction of the Wilson Point New Levee has affected the former drainage of the Stewartdale Plantation, and the Stewartdale Plantation has not in any wise been physically damaged by anything that defendant has done.

Stewartdale Plantation was leased by plaintiff to W. M. Razer in 1931 for a term of five years. In 1936 it was leased by plaintiff to J. L. Logan for a term of five years. During the cropping season of 1937 Logan cultivated approximately two hundred acres of the land, producing a normal yield of three-quarters of a bale of cotton an acre

and forty to sixty bushels of corn an acre. During the cropping season of 1937 more land was in intensive cultivation on this plantation than had been for a period of many years prior thereto. The value of farm lands in the Mississippi River Valley declined shortly after 1929. This decline was due largely to the general financial depression beginning in that year. Whether the decline in value of Stewartdale Plantation was augmented by the construction of the Wilson Point New Levee, and, if so, how much of the decline was due to that cause alone, is not satisfactorily established in the evidence.

9. No part of Stewartdale Plantation was used or encroached upon by defendant in constructing the Wilson Point New Levee; defendant has not torn down, removed, degraded, or otherwise impaired any part of the old levee and has no intention of doing so in the future; Stewartdale Plantation now enjoys the same levee protection against flood waters from the main stem of the Mississippi River as it had prior to the construction of the new levee, and since the construction of the new levee it has not been flooded by headwaters from the main stem of the river, nor has the construction in any wise increased the frequency and duration of seep and rain waters to which it has at all times been seasonably subjected, or caused seep and surface water to be impounded or to remain longer upon said land than it had remained prior to the new levee construction; this construction by the defendant has not affected the fertility of the land, nor interfered in any wise with its annual cultivation, cropping, and productivity; neither the owner of said plantation nor its tenants and lessees has, as a consequence of the construction of the new levee, been ousted from or deprived of the full use and enjoyment of the property, or any part thereof.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts established by the record with reference to the effect upon plaintiff's land of the construction by the defendant of a levee known as the Wilson Point New Levee

at Bunches Bend in the State of Louisiana have been set forth in the findings and need not be repeated here. They establish, we think, that the construction of this levee to the 1928 grade and section did not constitute a taking of plaintiff's property within the meaning of the Fifth Amendment. In the case of *United States* v. *Sponenbarger et al.*, 308 U. S. 256, 265–267, 270, the court held that a general plan of flood control, such as that embraced in the Jadwin Plan, does not require the government under the Fifth Amendment to pay landowners for damages which may result from "conjectural major floods, even though the same floods and the same damages would occur had the Government undertaken no work of any kind"; that in "* * * undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect"; that "If major floods may sometime in the future overrun the river's banks despite—not because of—the Government's best efforts, the Government has not taken respondent's property"; that "The Government has not subjected respondent's land to any additional flooding, above what would occur if the Government had not acted"; and that "the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all." The court further held that "While this Court has found a taking when the Government directly subjected land to permanent intermittent floods to an owner's damage, it has never held that the Government takes an owner's land by a flood program that does little injury in comparison with far greater benefits conferred."

In *Danforth* v. *United States*, 308 U. S. 271, 285, the court said: "A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Applying the rule announced in the cases above mentioned, we think it is clear that there has been no taking of plaintiff's property within the meaning of the Fifth Amend-

ment, and that plaintiff is not entitled to recover. See Finding 9.

The petition must therefore be dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CHARLES THOMPSON AND GEORGE K. THOMPSON, COPARTNERS, TRADING AS CHARLES AND GEORGE K. THOMPSON v. THE UNITED STATES

[No. 42963. Decided May 6, 1940]

On the Proofs

Government contract; decision of department head final.—Where contract provided that as to all disputes concerning questions of fact the decision of department head should be final, on appeal, and where the amount of equitable adjustment has been found by the head of the department, and where an examination of the record discloses that the amount so found is fair and equitable, it is held that the plaintiff is entitled to recover.

Same; acceptance of change order.—Where contractor accepted a change order as satisfactory, it is held that in the absence of any consideration there was no expressed contract between the parties binding upon both, as to the additional work to be performed.

Same; time limit waived.—Where under the contract the contractor had 10 days in which to assert a claim for adjustment of change order, and where contractor did not assert such claim within the time limit but later filed with the contracting officer a request for additional compensation, it is held that such request was not barred since the contracting officer entertained such request, passed upon it and denied it, thus waiving the time limit and extending the time within which an appeal might be taken.

The Reporter's statement of the case:

Messrs. John M. Martin and *Joseph C. McGarraghy* for the plaintiffs. *Messrs. E. F. Colladay, Alfred E. Dennis, Frank L. Martin, Jr.*, and *Colladay, McGarraghy, Colladay & Wallace* were on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are copartners in the general construction business.

2. Plaintiffs entered into a contract with the defendant March 22, 1929, according to the terms of which plaintiffs agreed to "furnish labor and materials, and perform all work required for tunnel, canal lining and structures, as described in Schedule No. 3 of Specifications No. 484, North Branch Canal, Yakima (Kittitas Division) Project—Washington," for a consideration of $345,878.25, the work to commence within 30 calendar days after date of receipt of notice to proceed and be completed within 600 calendar days from that date. The contract was on the approved standard Government form for construction work, and, together with the specifications incorporated therewith, is filed in the case and made part hereof by reference.

Except for grout connections and electrical outlets, the contract price was made up of estimated quantities of material at specific unit prices, and the aggregate consideration of $345,878.25 was variable.

The specifications give a general description of the work as follows:

> A concrete-lined circular pressure tunnel with an internal diameter of 111 inches and an over-all length, including inclined shafts, of approximately 3,596 feet will be constructed under the Yakima River and Swauk Creek. Between the river and the Northern Pacific Railroad a concrete and steel-lined vertical shaft with an internal diameter of 78 inches will be constructed to serve as a wasteway outlet. The steel riser will bifurcate near the natural ground surface into semisteel elbows and transition pipes to which will be attached two 42-inch internal differential valves to control the wasteway discharge. Concrete inlet and outlet transition structures for the tunnel and short reaches of concrete-lined canal above the inlet and below the outlet will be constructed, the canal lining above the inlet being provided with a gravel trap. Other appurtenant structures will be built, as shown on the drawings.

The tunnel was designed to carry water from the south side of the Yakima River, about 10 miles northwest of Ellensburg, State of Washington, to the north side of the river, for the irrigable lands of Kittitas Project, to go

down through the rock under the river, about 160 feet below the bed of the river, and to withstand an unbalanced hydrostatic head of about 350 feet. The project was under the Bureau of Reclamation.

3. Preparatory to advertising for bids the Government engineers had made core borings at the site of the work, the log of these borings was charted, and the chart attached to and made a part of the contract. The borings so charted indicated severally that the tunnel would go through (1) shattered and seamy basalt, (2) scoria, loose black tuff, shattered basalt, (3) blocky basalt, broken basalt, (4) broken seamy basalt, soft blue tufaceous shale (this condition extending down under the tunnel at that boring for some distance), (5) seamy broken basalt, blocky and broken basalt, seamy and broken basalt, and (6) seamy basalt.

Based on these disclosures the Government engineers had concluded that the tunnel would be in rock and that the hydrostatic pressure inside the tunnel would be exerted against a practically solid wall of rock in all directions. They designed the tunnel accordingly and in the contract specifications made their estimates of material to fit this situation. Except in a minor part of the tunnel the design called for a lining of unreinforced concrete approximately 15 inches thick, extending outward from an inside diameter of 9 feet 3 inches.

4. The plaintiffs commenced work in April 1929, sinking a vertical shaft to the central portion of the projected tunnel in order that work might be prosecuted in two directions.

In the autumn of the same year, after some 1,200 feet of the tunnel had been driven, the Government engineers, exaiming the excavation, determined that the tunnel would have to be redesigned to take care of the hydrostatic pressure, due to the presence of relatively unstable material surrounding the tunnel. They revised the contract drawings to provide for a reinforced concrete lining of 30 inches in thickness, in certain reaches where theretofore the provision had been for plain or unreinforced concrete of 15 inches. Inasmuch as the inside diameter of the tunnel was the same as before, 9 feet 3 inches, there was required a much greater

amount of excavation, and the portion already driven had to be reamed to make a larger bore.

In the process of strengthening the lining, to compensate for the weak and unsatisfactory material through which the tunnel was being driven, the Government engineers found it necessary to redesign the reinforcing steel for the project.

These changes were ordered by the contracting officer or his representatives orally, and the plaintiffs were furnished with drawings with which to be governed in the alterations to be made.

These changes were substantial and grew out of conditions unknown to and not contemplated by either party when the contract was entered into.

The extent of the changes made necessary by these unforeseen conditions could be determined only as the work progressed. The changes also required additional time for performance.

5. Plaintiffs complied with the oral instructions. The contracting officer was for some months undecided as to whether a change order should be issued covering the strengthened design. The contract price, insofar as here applicable, was calculated on unit prices for materials used or entering into construction, and he was at first of the opinion that inasmuch as he could calculate an increase in the originally estimated aggregate price of $345,878.25 by reference to the unit prices, without changing them, and that it was, as he believed, within his authority to order changes that did not increase those unit prices, no formal change order was necessary. At the same time he recognized the necessity for extension of time for performance, but was of the opinion that no extension could be granted without an order, changing the work, accepted by the contractor. In conference with the plaintiffs the contracting officer's representative told them that if an order for change was not issued it would be necessary to charge liquidated damages after the end of the contract period, and that the Government officers did not want to do that.

6. A number of conferences were had between the representatives of both parties, covering the changes that were

being made under the oral instructions of the contracting officer. They came to no entire agreement on the subject matter, and on or about October 30, 1930, when the work covered by the changes was in progress, an order on the plaintiffs for changes was signed by the contracting officer and sent to the plaintiffs for their acceptance, a copy of which order is exhibited in the amended petition at page 61 and made part hereof by reference.

With the change order was a letter of transmittal concluding as follows:

> If the Order for Changes is not satisfactory, it should be returned without your signature but accompanied by letter advising as to the items to which exceptions are taken.

This order, among other things, purported to increase the average thickness of the concrete tunnel lining from 15 to 30 inches, and to reinforce it. In the main, it calculated the increase in contract payments on the unit prices originally bid, estimating a total increase in payments to the plaintiffs of $106,597.53. The order increased the contract period by 150 calendar days. The plaintiffs signed the order November 25, 1930, with the following acceptance:

> Adjustment of the amount of compensation due under the contract and/or in the time required for its performance by reason of the changes above ordered is satisfactory and is hereby accepted,

and returned the order. The order was approved by the First Assistant Secretary of the Interior December 29, 1930.

There is no proof that the plaintiffs signed the order because of any threat by the contracting officer of the imposition of liquidated damages.

7. By letter of May 8, 1931, plaintiffs requested relief of the contracting officer, without stating any amount, representing that they were financially embarrassed through their attempt to complete the job, that when the change order was issued their finances were so impaired because of delay due to changed conditions that further financing would have been imperilled if liquidated damages at a rate of $3,000 per month (the contract rate of $100 per day)

had been assessed for delay, and that it was by reason thereof that they accepted the change order.

The changes in the contract work were completed by the plaintiffs June 6, 1931.

8. The contracting officer entertained the claim and on July 13, 1931, after consideration, denied it, citing certain of the specifications, and adding:

> Should you desire to appeal from this decision to the Secretary of the Interior, you may do so within 30 days from the date hereof, as contemplated by Article 15 of the contract. Such appeal should be addressed to the Secretary, but should be submitted to this office for transmittal to the Secretary. If appeal is made there should be set out in detail the amounts claimed under each item specified, substantiated by facts and reasons justifying consideration.
>
> Regarding remission of liquidated damages, which matter was discussed on May 19, 1931, with Mr. Charles Thompson and Mr. R. A. Garnett, it is believed that no further action on your part is required, until such time as you have been furnished copy of the contracting officer's findings of facts covering this matter, as contemplated by Article 9 of the contract, since formal request for remission of such damages was made in your letters of March 18 and April 22, 1931. A copy of the findings of facts will be furnished you as soon as practicable after completion of the contract.

9. The plaintiffs appealed to the Secretary of the Interior August 11, 1931, from the contracting officer's decision. In this appeal, which was lengthy and set forth numerous details, it was represented that the specification of a 15-inch thickness of unreinforced concrete lining bore out the mutual interpretation of the boring data, which interpretation was also the basis of the bid price; that the conditions encountered in the progress of the work were contrary to this mutual interpretation; that to meet the changed conditions the Government engineers required radical modifications in structure, the lining to be increased to 30 inches and heavily reinforced; that the Government engineers gave assurances that the contract would be changed when a tangible basis therefor was found; that the change order issued October 30, 1930, set a price far below actual cost; that the change

order granted 150 days' additional time for performance without which extension of time they would have been financially ruined, having already incurred a loss on the job and being indebted to their bank; and that they accepted the change order so that they might get an extension of time and avoid financial ruin. They also stated:

(a) The Government and we, at the time of entering into the contract, understood the underground conditions to be truly reflected in the logs and drill cores, in accordance with which an inadequate structure was planned and contracted for by the United States, whereas, actual underground construction of the tunnel developed the fact that that which the contracting parties assumed to exist did not in fact exist, and (b) we were compelled by circumstances over which we had no control, amounting in effect to actual duress, to accept an order of change, as above disclosed, to our detriment.

The appeal concluded with a prayer for relief.

10. The First Assistant Secretary of the Interior reversed the decision of the contracting officer December 7, 1932. A copy of the decision on appeal is attached to the amended petition as Exhibit C and is made part hereof by reference.

The Secretary held that the "enormous increase in quantities of excavation, concrete, and reenforcing steel indicates that the parties really made an amended contract"; and that the order for changes had been signed by the contractors under duress and was therefore void.

The Secretary proceeded:

The order for changes having been accepted under duress, it is void, and the question arises relative to the amount which shall be paid by the United States for the completion of the work. From the time of the execution of the contract until the time that work was slowed down, about November 25, 1929, the contractors were proceeding under the original contract and any loss that occurred over and above the amount of contract earnings must be charged against the contractor. On the remainder of the work which was completed by the contractors and accepted by the United States and is now in use by it as a part of the irrigation system, the contractors are entitled to receive compensation in accordance with paragraph 10 of the origi-

> nal agreement, namely, for the actual necessary cost, as determined by the contracting officer, plus 15 percent for superintendence, general expense, and profit.

The Secretary caused an audit to be made of plaintiffs' performance, and June 23, 1933, made a formal finding, stating plaintiffs' proper earnings, under his decision, for the period beginning November 26, 1929, as $506,718.67, for which they had received allocable thereto, $414,516.61, a difference of $92,202.06.

The Secretary concluded:

> It is my opinion, and I find as a fact that there is due the contractors as an equitable adjustment on account of increased work performed under the terms of the contract the total sum of $92,202.06.

Copy of the Secretary's findings and conclusion of June 23, 1933, is attached to the amended petition as Exhibit D and is made part hereof by reference.

For the first period of performance, up to the close of business November 25, 1929, plaintiffs had incurred costs of $120,373.25, for which period, allocable thereto, they had received of the Government $65,076.75, loss of $55,296.50.

11. The sum of $92,202.06 was vouchered by the contracting officer for plaintiffs' signature, with release. Upon its execution by the plaintiffs and return the voucher was forwarded to the General Accounting Office for settlement. March 22, 1934, it was disallowed by the Comptroller General on the ground that the appeal to the Secretary of the Interior had not been taken in time.

12. There is no proof that the adjustment made by the Secretary of the Interior was inequitable, or so grossly erroneous as to raise an implication of bad faith.

The court decided that the plaintiffs were entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiffs entered into a contract with the defendant on March 22, 1929, to "furnish labor and materials, and perform all work required for tunnel, canal lining and structures, as described in Schedule No. 3 of Specifications No.

484, North Branch Canal, Yakima (Kittitas Division) Project—Washington," for a consideration of $345,878.25, the work to commence within 30 calendar days after date of receipt of notice to proceed and to be completed within 600 calendar days from that date. The contract was on the approved standard Government form for construction work and the specifications were attached thereto.

The contract price was made up of estimated quantities of material, except for grout connections and electrical outlets, at specific unit prices, and the total consideration was variable.

The work consisted of a concrete-lined circular pressure tunnel with an internal diameter of 111 inches and an over-all length, including inclined shafts, of approximately 3,596 feet. It was designed to carry water from the south side of the Yakima River to the north side of the river for the irrigation of lands of the Kittitas Project and was to go down through the rock under the river about 160 feet below the river bed and to withstand an unbalanced hydrostatic head of about 350 feet. This undertaking was under the Bureau of Reclamation.

Previous to advertising for bids, the Government engineers had made core borings at the site of the work which showed the character of the soil and rock through which the tunnel would go and, as a result of these borings, the Government engineers had concluded that the tunnel would be of rock which could withstand the hydrostatic pressure inside the tunnel which would be exerted against practically a solid wall of rock in all directions. The specifications were made and the tunnel was designed to fit this situation. With the exception of a few instances the design required an unreinforced concrete lining of approximately 15 inches thick on the outside of the tunnel. The inside diameter of the tunnel was to be 9 feet 3 inches.

Plaintiffs commenced work in April 1929 by sinking a vertical shaft in the central portion of the projected tunnel in order that the work might be prosecuted in both directions. After about 6 months' work and some 1,200 feet of the tunnel had been driven, the Government engineers

determined that the tunnel would have to be redesigned because of the relatively unstable materials surrounding the tunnel in order to take care of the hydrostatic pressure. Accordingly, new plans and drawings were made so as to provide for reinforced linings of 30 inches where the original contract provided for only 15 inches. This also required the excavation of a larger amount of unstable material so as to provide for the extra reinforced concrete. It required also additional reinforced steel and certain timber bracings. These changes were radically and materially different from the original design contemplated by the specifications and on which the contract had been executed and grew out of conditions unknown to and not contemplated by either party when the contract was entered into. The extent of these unforeseen conditions which required these changes, could only be determined as the work progressed and necessarily required additional time for completion. At the time the additional work was ordered the contracting officer did not issue a written change order under Article 3 of the contract but orally instructed the contractors to comply with the new design and the work entailed thereunder as the project progressed. The contractors obeyed the oral orders of the contracting officer and complied with the new design and were paid by the contracting officer according to the unit prices as called for in the original contract. These conditions continued from the time of the changed plans in this indifferent and unsatisfactory way and the work proceeded until October 30, 1930, at which time the contracting officer forwarded a change order to the plaintiffs in which was contained the unit prices of the original contract on some of the items and estimated prices for other items in connection with the additional work. The increased price as allowed by the contracting officer was $106,597.53 and the plaintiffs were given an additional 150 days in which to complete the contract.

The completion date of the contract was on or about December 3, 1930, and, before the forwarding of the proposed change order, no orders for an extension of time had been granted

by the contracting officer although this additional work, occasioned by the new design, necessarily involved additional time for completion. In a letter written by the contracting officer transmitting the change order plaintiffs were instructed to sign the change order, if it was satisfactory, and if it were not they were instructed to return it without signature but with a statement as to the items to which exceptions were taken. The plaintiffs retained this change order until November 25, 1930, when they returned it as "satisfactory" and "accepted."

Under the terms of the contract, where extra work involved more than $500, it was necessary to receive the approval of the Assistant Secretary of the Interior, and this approval was not obtained until December 29, 1930.

On May 8, 1931, plaintiffs wrote a letter to the contracting officer in which it was stated that they had been subjected to heavy losses on the contract and asked to be rewarded for the work as done by them. They further stated that the reason for signing the change order was their financial embarrassment because of their attempt to complete the work and their fear of having liquidated damages assessed against them after the completion date of December 3, 1930, by reason of the fact that no extension of time had been given by the contracting officer other than that stated in the written change order.

The work was completed on June 6, 1931.

The contracting officer entertained the claim, as made by the plaintiffs in their letter of May 8, 1931, but denied it. The contracting officer did, however, notify the plaintiffs on July 13, 1931, that they had the right to appeal from his decision to the Secretary of the Interior and that they could make an appeal within 30 days.

Plaintiffs filed an appeal with the Secretary of the Interior on August 11, 1931, which was within the 30 days from the decision of the contracting officer. The Secretary of the Interior entertained the appeal and rendered a decision on December 7, 1932, in which he held that there had been an enormous increase in quantities of excavation, concrete, and reinforcing steel and that the order for changes had been signed by the contractors under duress and the change order was therefore void.

The Secretary of the Interior had an audit made of plaintiffs' work under the changed conditions and on June 23, 1933, rendered a decision in which he found that plaintiffs were entitled to an additional amount of $92,202.06, as an equitable adjustment on account of increased work performed.

This sum was vouchered by the contracting officer for plaintiffs' signature and release and, upon its execution by the plaintiffs, the voucher was forwarded to the General Accounting Office for settlement. On March 22, 1934, it was disallowed by the Comptroller General on the ground that the appeal to the Secretary of Interior had not been taken within the agreed time.

Plaintiffs contend that, owing to the material changes in the contract, they were entitled not only to an equitable adjustment but also to certain additional amounts which were incurred in the preparation and execution of the first part of the contract. We do not seriously consider that the plaintiffs have any claim for extra allowances for interest on capital investments or interest on capital borrowed from banks. Plaintiffs undertook the work under the oral change order and are confined to the terms of the contract under these conditions.

The defendant contends that when the plaintiffs accepted the change order, as satisfactory, there was an expressed contract made between the parties as to the additional work to be performed and which was binding on both. We do not consider this a valid contention for the reason that there was a total lack of consideration and there is nothing in the contract requiring an acceptance of a change order by the contractors. The contract expressly provides, under Article 3, that the contracting officer can issue change orders under certain conditions.

Article 3 of the contract reads as follows:

> *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and

> the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

There can be no doubt that the change order was within the general scope of the contract and it appears to have been regularly issued, after some vacillation and hesitancy on the part of the contracting officer as to the necessity for it and the additional allowances for the items of additional work and material.

The contractors from the time the work was redesigned and before any written change order was issued carried out the redesigned work and complied with the oral change order without protest or cessation of the work.

If the compliance of the contractors with the oral order was not under duress, certainly their acceptance of the written change order could not be said to have been under duress. During all this time between the commencement of the redesigned work, which called for additional material, and the date of the issuance and acceptance of the written change order, no protest or intimation of duress is found in the record. It was not until the appeal was taken to the Secretary of the Interior that duress was alleged.

We cannot find from the record that any duress was exerted upon the plaintiffs. However, the written change order was not agreed upon by the parties in terms of items and amounts when it was drawn up by the contracting officer; and, as the time for completion of the contract was drawing to an end and additional work necessarily required additional time which had not been granted by the contracting officer, indirect and seeming imposition of liquidated damages was before the contractors and may

have been the controlling force which impelled them to agree to signing the written change order as sent to them by the contracting officer. From subsequent events the contracting officer entertained doubt as to the amounts in the written change order and the feeling that perhaps the plaintiffs had not received all to which they were entitled.

Under the terms of the contract, the plaintiffs had 10 days in which to assert a claim for adjustment of the change order. They did not assert such a claim within the time limit but after some months had elapsed they filed with the contracting officer a letter asking for additional compensation. This request would have been barred and out of time had not the contracting officer entertained it, passed upon it, denied it, and informed plaintiffs that they could appeal to the Secretary of the Interior. Under Article 3 of the contract which provided for the changes, the contracting officer had the right to extend the time in which to assert a claim for adjustment of the change order, and therefore, when the request of the plaintiffs was received and acted upon, the 10-day provision was waived by the contracting officer and the time extended within which to take an appeal.

Plaintiffs did take an appeal within the 30 days prescribed by Article 15 of the contract and therefore the Secretary of the Interior had the right to pass on plaintiffs' claim as presented to the contracting officer.

Article 15 of the contract reads as follows:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Under Article 3 of the contract where the amount caused by the changes made an increase due under the contract or in the time required for its performance, an equitable adjustment should be made to the contractor and the contract

modified in writing accordingly. This modification in plaintiffs' contract involved an amount of over $500 and had to be approved by the head of the department or his authorized representative. The head of the department in this case was the Secretary of the Interior under whom the Reclamation Bureau operated.

The Assistant Secretary of the Interior was the authorized representative of the Secretary of the Interior and he found the equitable adjustment to be $92,202.06. Under Article 15 of the contract all decisions of the head of the department on questions of fact were final and conclusive.

The amount of equitable adjustment having been found by the head of the department, and a thorough examination of the record having been made by us, we are of the opinion that the amount so found is a fair and equitable adjustment and should not be disturbed.

The plaintiffs are entitled to recover the sum of $92,202.06.

It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

SAM I. RUBENSTEIN v. THE UNITED STATES

[No. 43436. Decided May 6, 1940]

On the Proofs

Pay and allowances; medical and hospital expenses of Army Reserve officer.—Where plaintiff, a reserve officer in the United States Army, while returning to his home from active duty was injured in an automobile collision, in which a board of officers held he was not at fault, and where on account of the nature of his injuries emergency treatment by civilian physicians was necessary, in civilian hospital, there being no Army surgeons nor Army hospital immediately available, and where due and timely report was made to the proper officers by plaintiff in accordance with Army regulations, it is held that plaintiff is entitled to recover for the amount necessarily expended by him for such medical service and hospital expenses and for active duty pay and allowances for the period of his disability.

The Reporter's statement of the case:

Mr. Louis B. Montfort for the plaintiff. *Mr. George L. Hart, Jr.*, was on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff, a reserve officer in the United States Army, sues to recover $460.37, representing active-duty pay and allowances of $353.82 for a portion of a period during which he was incapacitated due to injuries sustained in line of duty while returning to his home from active-duty service and for reimbursement of the unallowed portion of $106.55 for expenses incurred and paid for medical services by reason of injuries accidentally received in line of duty.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of the United States and is, and during the period involved in this cause was, a resident of Syracuse, New York.

2. By paragraph 5, Special Orders, No. 132, Headquarters of the Second Corps Area, Governors Island, New York, dated June 6, 1934, plaintiff, then a first lieutenant, Infantry Reserve, United States Army, was ordered to and served on active duty for the period June 17 to June 30, 1934, at Plattsburg Barracks, New York. While traveling in his own private automobile from Plattsburg Barracks to return to his home in accordance with the orders, the automobile which was being driven by plaintiff accidentally collided at about 11:15 p. m., June 29, 1934, about one mile south of Pulaski, New York, on the Pulaski-Syracuse road, with an automobile being driven by a civilian. As a result thereof plaintiff sustained a fracture of the external condyle of the right tibia extending into the knee joint.

3. Plaintiff was given first-aid treatment at the scene of the accident by Dr. John L. H. Mason of Pulaski and by State Troopers was conveyed and removed to the office of Dr. Mason at Pulaski where he was given an X-ray exam-

ination of his right leg at the knee, and was treated for cuts and bruises. There was no hospital at Pulaski and plaintiff was taken to the physician's home where he stayed for the night.

On the afternoon of June 30, 1934, plaintiff, by his own arrangements, was removed by ambulance to his home in Syracuse.

The next day, Sunday, July 1, 1934, plaintiff called in Dr. Richard S. Farr, of Syracuse, to check the condition of his leg and the treatment previously given.

Monday morning, July 2, 1934, plaintiff telephoned Major William H. McCutcheon of headquarters, 98th Division, and reported the accident to him. Major McCutcheon immediately called upon the plaintiff and secured from him an account of the accident in affidavit form for presentation to a board of inquiry.

The military authorities were not advised of the accident and injuries to plaintiff until after he had been transferred to his home in Syracuse.

4. A board of officers appointed pursuant to paragraph 4, Special Orders, No. 83, Headquarters, 98th Division, Syracuse, New York, dated July 6, 1934, inquired into the cause of plaintiff's injuries and determined that he was injured in line of duty while on active duty and was not under the influence of intoxicating liquors or drugs when the accident occurred, and that his injuries were not due to any misconduct on his part. The board's findings were approved by the War Department August 20, 1934.

5. On or about July 13, 1934, Dr. Farr called in Dr. Maurice J. Lavine, of Syracuse, who gave the plaintiff another X-ray examination to determine whether the fractures were satisfactorily knitting.

6. After approval of the Board's findings, plaintiff received further treatment at the Army hospital at Fort Ontario, New York. At any time plaintiff could have been transported for treatment at Government expense to the Army hospital at Fort Ontario, a distance of approximately 25 miles from Pulaski. Syracuse is approximately 37 miles from Pulaski.

7. During the period of this claim plaintiff was an employee of the United States, enrolled as an internal-revenue agent, Buffalo Division, at an annual salary of $3,200. From the time of the accident to October 13, 1934, plaintiff, on account of the accident, was incapacitated from performing his regular duties as internal-revenue agent. By reason of being thus unable to perform his regular duties he suffered a deduction of his pay from September 4, 1934, to October 13, 1934.

8. By reason of his injuries plaintiff incurred the following obligations for medical services and treatment:

To Dr. John L. H. Mason, June 28 to 30, 1934, for room, $4; nurse, $5; X-ray, $10; reduction of fracture, casting, $25; first aid at scene of accident and subsequent medical care, $5; a total of $49.

He expended for ambulance service by the White House Trucking Co., June 30, 1934, $35; to Dr. Maurice J. Lavine, July 13, 1934, for portable X-ray examination, $25; to Dr. Richard S. Farr, 5 treatments from July 1 to August 29, 1934, $28; to Visiting Nurse Association, 51 visits from July 3 to October 2, 1934, $53.55; a total expenditure of $141.55.

9. Prior to the approval on August 20, 1934, by the War Department of the findings of the board of officers that plaintiff had been injured while on active duty, plaintiff was advised by Major William H. McCutcheon of headquarters of the 98th Division that plaintiff could not be hospitalized at Government expense, nor could Government funds be expended for his necessary medical treatment until after the War Department had approved the findings of the board of officers appointed, as stated in finding 4. Plaintiff was also advised prior to August 20 by Colonel Conrad H. Lanza, the Regular Army officer acting as Chief of Staff of the 98th Reserve Division, that he had searched through all the Army Regulations and could find no authority under which he could order plaintiff to an Army hospital for treatment or incur the expenditure of Government funds for medical treatment of plaintiff's injuries prior to the time the War Department had approved the board of inquiry's findings in plaintiff's case with reference to the injuries received by him. By August 20, 1934, when the War

Department had approved the findings of the board, plaintiff had already and necessarily incurred practically all of the medical expenses in connection with and necessary to treatment of the injuries received by him. After the approval by the War Department on August 20 of the findings of the board of inquiry, plaintiff was on two occasions taken by officers of the 98th Division headquarters to the Army hospital at Ft. Ontario, at Oswego, New York, on which occasions examinations were made of his injuries.

10. Through the Chief of Finance, War Department, plaintiff submitted a claim for $544.07, reimbursement for the expenditures for medical services and treatment on account of the accident, and for $353.82 for pay and allowances from September 4, 1934, to October 13, 1934, which was disallowed by the Comptroller General. Subsequently, on review, the General Accounting Office, by settlement dated August 30, 1935, allowed plaintiff $35 on account of reimbursement of the cost of ambulance service and by settlement dated October 21, 1935, allowed Dr. J. L. H. Mason $49 on account of medical and professional services rendered plaintiff. This left an unpaid balance for pay and allowances, and medical expenses of $460.37.

11. For the period from September 4, 1934, to October 13, 1934, a correct computation of plaintiff's active-duty pay and allowances under the Act of April 26, 1928, 45 Stat. 461, is $353.82.

12. Plaintiff did not at any time during his incapacity specifically request that he be furnished hospitalization or necessary medical services at Government expense.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In view of the facts and circumstances as set forth in the findings, we are of opinion that under the act of April 26, 1928, 45 Stat. 461, 462, paragraphs 12 and 13 of Army Regulations 35–3420, Change 1 effective June 20, 1932, and paragraph 3 of Army Regulations 40–505, effective January 10, 1934, the plaintiff is entitled to recover the unpaid bal-

ance of $460.37 representing pay and allowances for the period September 4 to October 13, 1934, and the reasonable and necessary expenses incurred and paid by him for necessary medical attention and treatment. The act of 1928 provides, so far as material here, as follows:

> That * * * members of the Officers' Reserve Corps * * * of the Army who suffer personal injury or contract disease in line of duty while on active duty under proper orders * * * shall, under such regulations as the President may prescribe, when hospital treatment is necessary for appropriate treatment of such injury or disease, be entitled to hospital treatment, including medical treatment, at Government expense, * * * and, during the period of hospitalization, to the same pay and allowances * * * that they were entitled to receive at the time such injury was suffered or disease contracted, and to transportation to their homes at Government expense when discharged from hospital; they shall also be entitled to such further medical treatment for such injury or disease as is reasonably necessary after arrival at their homes under such regulations as may be prescribed by the President.

The Army Regulations referred to provide in substance, so far as material under the facts here disclosed, that when treatment in Army hospitals or by military personnel is not available, civilian medical and hospital services may be employed and that accounts for medical and hospital services will be allowed at reasonable rates approved by the corps area commander; that, except in emergency, authority of the corps area commander must be secured before any Government funds are obligated for medical care and that when, in an emergency, medical care has been secured without authority, immediate report of the facts and circumstances connected therewith should be forwarded to the corps area commander. These regulations further provide that when medical attendance is required and cannot otherwise be had, the commanding officer may employ the necessary civilian service, and just accounts therefor will be paid by the medical department; that when the officer who requires such treatment is on duty without troops, he may arrange for the required service and make an immediate report to the proper officials.

The facts clearly show that the circumstances of plaintiff's injuries produced an emergency situation which clearly entitled him under the Army Regulations made pursuant to law to obtain and to incur the expenses necessary for proper medical treatment. In these circumstances we think that plaintiff is entitled to recover the unpaid balance of his necessary expenses and his active-duty pay and allowances in view of the fact that he duly and promptly, as early as practicable, reported the matter to the proper officers of the 98th Reserve Division, under whom and in which he was serving, and he was advised that until the board of Army officers appointed on July 6 had considered the matter, made a report to the War Department, and until such report had been approved by the War Department, the plaintiff could not be given medical treatment for his injuries at Government expense. The findings of the board of officers were approved by the War Department on August 20, 1934, at which time plaintiff had incurred and paid substantially all the medical expenses here involved. Plaintiff's injuries required prompt medical attention and treatment and he was not required to wait until some indefinite time in the future for the Government to furnish such medical service. The statute and regulations are clearly broad enough to entitle plaintiff to reimbursement for his necessary expenses and to the active-duty pay and allowance for the period September 4 to October 13, 1934.

Defendant relies upon the case of *Brunner* v. *United States*, 81 C. Cls. 489, but that case is not in point. In that case it appears that plaintiff had been receiving hospital treatment at Government expense but that he left the hospital and returned to his home and sued to recover expenses incurred and paid for medical treatment at his home after he had left the hospital. The present case is in no wise similar.

Judgment will be entered in favor of plaintiff for $460.37. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

HEEP OIL CORPORATION v. THE UNITED STATES

[No. 43709. Decided May 6, 1940]

On the Proofs

Income tax; deduction for cost and depletion in sale of oil wells and leases.—Where plaintiff, a Texas corporation, conveyed to another certain oil, gas, and mineral leases and oil wells, together with machinery, equipment, improvements and personal property, in consideration of a cash payment and the discharge of certain indebtedness, together with the proceeds of the sale of a certain percentage of part of the oil and gas produced and sold, less royalties, it is held that plaintiff could not deduct in its income tax return both the cost of the property so conveyed and also depletion with respect to the deferred payments.

Same.—Where in a transfer of oil wells and leases there is retained by taxpayer an economic interest in the oil in place sufficient to entitle taxpayer to deduct depletion, there cannot be deduction for both depletion and cost.

Same.—Where in a transfer of oil wells and leases, taxpayer did not reserve from the conveyance oil in place from the proceeds of the sale of which oil the deferred payments were made, there cannot be deduction for both depletion and cost.

Same.—Where in a transfer of oil wells and leases for part cash and balance in deferred payments from the proceeds of the sale of oil in place, if deduction for depletion is allowed, such deduction must be computed with respect to the entire amount paid and not merely on the deferred payments.

The Reporter's statement of the case:

Mr. Clarence F. Rothenburg for the plaintiff. *Hamel, Park & Saunders*, *Charles D. Hamel*, *Lee I. Park*, and *John Enrietto* were on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of facts entered into between the parties:

1. Plaintiff is a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business in the City of San Antonio in said State.

2. Prior to March 22, 1930, plaintiff was the owner and in possession of two oil and gas mining leases, one known as the Joe St. John Lease, and the other known as the J. T. Vance Lease, both located in Refugio County, State of Texas, and upon each of which it had drilled and was producing oil and gas in paying quantities.

3. On March 22, 1930, plaintiff entered into an agreement with the Houston Oil Company of Texas, a Texas corporation, which provided, among other things, as follows:

I

Heep Oil Corporation, a Texas corporation, for and in consideration of the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00), to it cash in hand paid by the Houston Oil Company of Texas, receipt whereof is hereby acknowledged and confessed, and for and in consideration of the further considerations hereinafter particularly set forth, has GRANTED, SOLD, CONVEYED, TRANSFERRED, ASSIGNED, AND DELIVERED, and does by these presents GRANT, SELL, CONVEY, TRANSFER, ASSIGN, and DELIVER unto the Houston Oil Company of Texas, a Texas Corporation, those two certain oil, Gas and Mineral Leases, the two oil wells thereon, the machinery, equipment, improvements, personal property of every kind and character thereon situated belonging to the Heep Oil Corporation, said Leases covering lands situated in Refugio County, Texas, and being more particularly described as follows:

(1) Oil, gas, and Mineral Lease from Joe St. John et al to Herman F. Heep, dated October 24, 1929, and recorded in Vol. 14, Page 130, of the Deed Records of Refugio County, Texas, and covering the whole of Block No. One (1) of a Subdivision of the Tract No. One (1) of the Town Commons of the Town of Refugio, and being known as the Sunshine Addition;

(2) Oil, Gas, and Mineral Lease from J. T. Vance et ux of Refugio County, Texas, to William F. Morgan, dated the 12th day of September 1929, and being recorded in Vol. 13, pages 575–579, of the Deed Records of Refugio County, Texas, and covering a tract of Eight (8) acres and being the Northeast Quarter of Tract No. Five (5) of a Subdivision of the Town Commons of the Town of Refugio, Refugio County, Texas.

TO HAVE AND TO HOLD the above described premises, leases, oil wells, improvements, and personal property unto the said Houston Oil Company of Texas, its successors and assigns forever.

II

In addition to the One Hundred Thousand Dollars cash consideration paid by Houston Oil Company of Texas to Heep Oil Corporation in consideration of the foregoing conveyance and assignment, the Houston Oil Company of Texas agrees to pay the following additional considerations:

(1) Houston Oil Company of Texas agrees to pay off and discharge the indebtedness of SIX THOUSAND DOLLARS ($6,000.00) now due and owing by the Heep Oil Corporation to William F. Morgan or his assigns, more particularly described and referred to hereinabove:

(2) Houston Oil Company of Texas recognizes and acknowledges that there is now outstanding in addition to the royalty payable to the Lessor, Joe St. John et al, an additional overriding royalty of ONE-ONE HUNDRED SIXTIETH (1/160th) to James H. Johnson, as provided for in that certain Mineral Deed from Herman F. Heep to James H. Johnson, dated October 25, 1929, and recorded in Vol. 14, page 79 of the Deed Records of Refugio County, Texas, to which reference is hereby made;

(3) The foregoing assignment made expressly subject to a reservation of a ONE THIRTY-SECOND (1/32nd) part of the oil and gas to be produced out of the leases hereinabove described from any oil and/or gas producing sands below the level of Thirty-eight Hundred (3800) feet, and which said 1/32nd royalty is hereby expressly reserved unto the Heep Oil Corporation;

(4) Houston Oil Company of Texas further agrees to pay unto the Heep Oil Corporation the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) out of One-half (1/2) of the oil and/or gas produced by the said Houston Oil Company of Texas and marketed by it from the above-described leases, after having first deducted from the total of the production so produced and marketed the royalties payable to the lessors in said leases or their assigns and the overriding royalties above described and referred to, it being the intention hereof to provide for the payment of said sum of ONE HUNDRED THOUSAND DOLLARS ($100,-

000.00) out of, and only out of, One-half of the amount remaining from said production unto the Houston Oil Company of Texas after the prior payment of the royalties and overriding royalties therefrom. In the event that such One-half (1/2) of the oil and gas thus remaining which shall be produced and marketed by the Houston Oil Company of Texas from the above-described leases shall be insufficient in quantity and value to fully pay off said consideration of One Hundred Thousand Dollars ($100,000.00) hereinabove provided for, then and in that event said Houston Oil Company of Texas shall have no other or further liability unto the Heep Oil Corporation on account of so much of said One Hundred Thousand Dollar payment remaining unpaid and unsatisfied. The plain intention of the parties hereto is that said sum of money is to be payable solely and only out of production in the event that the portion of such production applicable to such payment shall be sufficient to liquidate said payment.

4. On April 8, 1930, plaintiff and said Houston Oil Company of Texas entered into a supplemental agreement with respect to the leases aforesaid making provision for an obligation previously assumed by plaintiff to one William F. Morgan to receive Four Thousand Dollars ($4,000) out of the production of oil or gas from the J. T. Vance lease aforesaid.

5. After the execution of the above agreements, all oil and gas produced from the above leases, except the royalties due to the original lessors and the overriding royalty to James H. Johnson, were marketed by Houston Oil Company of Texas.

6. The aforesaid agreements were performed by all parties in accordance with the terms thereof, and during the calendar year 1930 plaintiff received, under said agreements, in addition to the One Hundred Thousand Dollars ($100,000.00) cash payment and discharge of its Six Thousand Dollar ($6,000.00) indebtedness mentioned therein, the sum of Forty-Six Thousand Nine Hundred Forty-Seven and 28/100 Dollars ($46,947.28). Said amount of Forty-Six Thousand Nine Hundred Forty-Seven and 28/100 Dollars ($46,947.28) represented payments "out of One-half (1/2) of the oil or gas produced by said Houston Oil Company of Texas and marketed by it."

Reporter's Statement of the Case

7. On March 14, 1931, plaintiff filed its Federal income tax return for the calendar year 1930 disclosing therein a net income for said year of $35,580.84 and a tax due thereon of $4,269.70, which it paid as follows:

On March 18, 1931	$1,067.43
On June 17, 1931	1,067.43
On September 15, 1931	1,067.42
On December 15, 1931	1,067.42

Thereafter the Commissioner of Internal Revenue determined an additional income tax liability against plaintiff for said year in the amount of $4,790.50, which it paid on June 3, 1932, together with interest thereon in the sum of $355.88. Said additional tax was due to the adjustment of a loss reported on another lease charged off during the year and is not in controversy in this case.

In its said income tax return for 1930 plaintiff reported, and in his determination of the aforesaid deficiency the Commissioner determined, a profit on the above transaction with the Houston Oil Company of Texas of $74,534.65, computed as follows:

Cash received, or its equivalent	$106,000.00	
Payments out of oil	46,947.28	
		$152,947.28
Less cost of leases and equipment adjusted for depletion and depreciation		78,412.63
PROFIT		74,534.65

8. The cost of the leases and equipment to plaintiff, covered by the foregoing agreement between plaintiff and Houston Oil Company of Texas on March 22, 1930, as adjusted for depletion and depreciation, was $78,412.63.

Plaintiff took no deduction in its said tax return for 1930 for depletion with respect to the payments received by it from Houston Oil Company of Texas, and the Commissioner of Internal Revenue in his final determination of plaintiff's tax liability for said year refused to allow any deduction with respect to said payments on account of depletion.

If it be held that plaintiff is entitled to take depletion on the aforesaid $46,947.28, then it is agreed that the amount of such depletion is 27½ percent of said amount, without

limitation, and that the revised taxable net income as finally determined by the Commissioner of Internal Revenue for the calendar year 1930 in the amount of $75,501.65 should be reduced accordingly.

9. On May 19, 1933, plaintiff filed with the Collector of Internal Revenue at Austin, Texas, its claim for the year 1930, in which it asked for the refund of $4,472.08 upon the following grounds:

> During the year 1930 this taxpayer transferred oil properties to the Houston Oil Company and received $100,000.00 in cash and retained a $100,000.00 interest in future oil to be produced. In the computation of taxable income, no allowance for depletion was deducted by the revenue agent. This taxpayer relies upon a United States Supreme Court Decision entitled Palmer v. Bender, #215, October Term, Decided January 9, 1933.

Said claim for refund was rejected by the Commissioner of Internal Revenue on October 25, 1935, and plaintiff was duly notified thereof by registered mail.

10. On September 25, 1937, plaintiff filed with the Commissioner of Internal Revenue a request for reconsideration of its claim for refund.

By letter mailed on October 14, 1937, the Commissioner of Internal Revenue denied said request because of insufficient time left within which to act thereon.

11. Plaintiff is the sole owner of the claim sued upon and has never transferred or assigned the same, or any part thereof, or any interest therein, and no action on the said claim, except as herein stated, has been had in Congress or in any of the Departments of the Government.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the Court.

On March 22, 1930, the plaintiff executed an instrument under the terms of which it "granted, sold, conveyed, transferred, assigned, and delivered" to the Houston Oil Company of Texas, two oil, gas, and mineral leases, together with the machinery, equipment, improvements, and personal

property situated thereon. The consideration for the conveyance was $100,000 in cash, the assumption of an obligation of the grantor of $6,000, and the agreement on the part of the Houston Oil Company to pay an additional sum of $100,000 "out of one-half (½) of the oil and/or gas produced by the said Houston Oil Company of Texas and marketed by it from the above-described leases," after having first paid the royalties. It was further provided:

> It being the intention hereof to provide for the payment of said sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) out of, and only out of, One-half of the amount remaining from said production unto the Houston Oil Company of Texas after the prior payment of the royalties and overriding royalties therefrom. In the event that such One-half (½) of the oil and gas thus remaining which shall be produced and marketed by the Houston Oil Company of Texas from the above-described leases shall be insufficient in quantity and value to fully pay off said consideration of One Hundred Thousand Dollars ($100,000.00) hereinabove provided for, then and in that event said Houston Oil Company of Texas shall have no other or further liability unto the Heep Oil Corporation on account of so much of said One Hundred Thousand Dollar payment remaining unpaid and unsatisfied. The plain intention of the parties hereto is that said sum of money is to be payable solely and only out of production in the event that the portion of such production applicable to such payment shall be sufficient to liquidate said payment.

During the year 1930, plaintiff received from the Houston Oil Company, in addition to the $106,000 paid at the time of the execution of the instrument, the sum of $46,947.28, representing one-half of the proceeds of the oil or gas produced and marketed during the year, less the royalties. In its income-tax return for the year 1930 the plaintiff deducted from the total sum of $152,947.28 received during the year the cost to it of the leases and equipment, less depletion and depreciation, amounting to $78,412.63. This resulted in a profit on the transaction in the sum of $74,534.65, which amount plaintiff included in its income for said year. This was approved by the Commissioner.

Later, the plaintiff filed a claim for refund of $4,472.08 alleging that it was entitled to depletion with respect to the $46,947.28, which it had not deducted in its return.

On rejection of this claim, this suit was brought.

Plaintiff claims the right to deduct from the cash payment the cost of the property, and to deduct depletion with respect to the deferred payments. We are of the opinion that this cannot be done under the terms of the instrument in this case.

The plaintiff's conveyance was of all the oil and gas deposits on the leased premises. It did not reserve from the conveyance any part of the oil and gas in place, except for "one thirty-second (1/32nd) part of the oil and gas to be produced out of the leases hereinabove described from any oil and/or gas producing sands below the level of Thirty-eight Hundred (3800) feet." All other oil and gas were sold. The instrument provides that the plaintiff has—

> GRANTED, SOLD, CONVEYED, TRANSFERRED, ASSIGNED AND DELIVERED, and does by these presents GRANT, SELL, CONVEY, TRANSFER, ASSIGN and DELIVER unto the Houston Oil Company of Texas, a Texas Corporation, those two certain Oil, Gas and Mineral Leases, the two oil wells thereon, the machinery, equipment, improvements, personal property of every kind and character thereon situated belonging to the Heep Oil Corporation, said Leases covering lands situated in Refugio County, Texas, and being more particularly described as follows:
>
> * * * * * * *
>
> TO HAVE AND TO HOLD the above described premises, leases, oil wells, improvements and personal property unto the said Houston Oil Company of Texas, its successors and assigns forever.

The clause providing for the reservation of a part of the oil produced below the 3800-foot level reads as follows:

> (3) The foregoing assignment made expressly subject to a reservation of a ONE THIRTY-SECOND (1/32nd) part of the oil and gas to be produced out of the leases hereinabove described from any oil and/or gas producing sands below the level of Thirty-eight Hundred (3800) feet, and which said 1/32nd royalty is hereby expressly reserved unto the Heep Oil Corporation.

It is clear that the balance of the oil was covered by the conveyance.

It may be that plaintiff did retain an economic interest in the oil in place sufficient to entitle it to depletion. (*Palmer* v. *Bender*, 287 U. S. 551; *Helvering, Commissioner*, v. *Twin Bell Oil Syndicate*, 293 U. S. 312; *Thomas, Collector* v. *Perkins, et al*, 301 U. S. 655; *Helvering, Commissioner* v. *O'Donnell*, 303 U. S. 370; *Helvering, Commissioner*, v. *Elbe Oil Land Development Company*, 303 U. S. 372.) But it is clear that it cannot deduct both depletion and cost, since it did not reserve from the conveyance the oil, out of the proceeds of the sale of which it received the deferred payments. This also was sold. Had it not been sold a different case would be presented.

We do not decide whether or not plaintiff is entitled to depletion. We hold only that it is not entitled under the instrument in this case to deduct both the cost to it of the property and depletion also.

We are further of the opinion that if it is entitled to depletion, this depletion must be computed with respect to the entire amount paid and not merely on the deferred payments to be made out of the oil produced.

In *Commissioner* v. *Fleming*, 82 F. (2d), 324, the majority of the court in the Fifth Circuit held that depletion should be computed only on the deferred payments, on the theory that that part of the oil out of which the deferred payments were to be made had not been sold. Circuit Judge Foster dissented. The Ninth Circuit, on the other hand, in the case of *Helvering* v. *Elbe Oil Land Development Company*, 91 F. (2d), 127, held that depletion should be computed both on the deferred payments and the cash payment as well. Judge Garrecht dissented, but not on this ground. The Supreme Court reversed the Circuit Court of Appeals (*Helvering* v. *Elbe Oil Land Development Company*, 303 U. S. 372), but on the ground that the transaction there was an absolute sale of the leasehold, with no reservations to the grantor of any economic interest in the oil situated thereon.

If by the instrument in the case before us, properly construed, the plaintiff had conveyed all of the oil except a por-

tion which it reserved to itself, it would follow that it was entitled to depletion only on the oil reserved, but, as we said heretofore, we think the conveyance here was of all the oil, except for the 1/32nd part of that produced from sands below the 3800-foot level. In such case, if plaintiff's net income is to be computed by the deduction of depletion from the amount received, rather than the cost of the property, it must be computed with respect to the entire amount received. The cash payment must be treated as a bonus or advance royalty. (*Burnet* v. *Harmel*, 287 U. S. 103; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299.)

The depletion deduction on this basis and on the basis of payments made in 1930 amounts to $42,060.50. If the entire amount had been received during the year, the total depletion allowance would have been $56,650.00. But the plaintiff in its return deducted more than this amount, to-wit, $78,412.63. It results that it has not overpaid its tax.

Its petition is accordingly dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

ALBERT C. KIRCH v. THE UNITED STATES

[No. 43556. Decided May 6, 1940]

On the Proofs

Flood control; taking of property.—Where in the construction of a set-back levee on the Mississippi River in 1931, no part of plaintiff's land was used or encroached upon by the Government, and where no part of the old river-front levee bounding plaintiff's land was torn down, removed or otherwise impaired, and where the new construction has not injuriously affected the fertility of the soil nor interfered with its annual cultivation and planting, and where plaintiff has not been ousted from his land nor deprived of the use and enjoyment of his property, it is held that there has been no taking of plaintiff's property within the meaning of the Fifth Amendment and that plaintiff is not entitled to recover.

Same; purpose of flood control legislation.—In the flood-control legislation enacted by Congress and the acts of the Government designed to carry out the program of such legislation, the Government in its effort to control the flood waters of the Mississippi River was endeavoring to improve the navigability of that river and to protect from floods as much land and property as it was feasible to protect, but did not assume responsibility to an owner of riparian land for damages that were consequential or incidental.

Same; duty of Government.—It was not the duty of the Government to provide complete protection to lands situated behind the old river-front levee; the Government is under no legal obligation to construct and maintain levees that will protect every riparian owner. *Jackson* v. *United States*, 230 U. S. 1.

Same.—The Government is under no legal obligation to respond in damages for injuries that may result from surrounding or encircling land by a set-back levee and a river-front levee. *Hughes* v. *United States*, 230 U. S. 24.

Same.—The flood-control act furnishes no legal basis for the payment of consequential damages by reason of depression in the market value of property, which may be due to causes other than the erection of new levees. *United States* v. *Sponenbarger et al.*, 308 U. S. 256.

Same.—Depreciation in market value does not in itself constitute a taking of property. *Vansant* v. *United States*, 75 C. Cls. 562.

Same.—The raising of levees in one locality or the failure to raise them in another, so as to afford equal protection to all landowners, does not constitute a taking under the Fifth Amendment. *Matthews, Trustee,* v. *United States*, 87 C. Cls. 662, and other cases cited *supra*.

The Reporter's statement of the case:

Mr. Bailey Springston for the plaintiff. *Mr. J. O. Modisette*, *Mr. W. H. Adams*, *Mr. Thomas M. Wade, Jr.*, and *Mr. George B. Springston* were on the brief.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $29,561 with interest at six percent per annum from July 11, 1931, as just compensation for the alleged taking of 153.36 acres of land by the defendant by the construction of a set-back levee on the Mississippi River in Madison Parish, Louisiana, as set forth in the findings, which levee was completed on July 11, 1931.

The defendant denies that the construction of this levee constituted a taking of plaintiff's property within the meaning of the Fifth Amendment, and asks that the petition be dismissed.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On the 17th day of January 1918 plaintiff became the owner of a tract of land, with improvements thereon, located in the Parish of Madison, State of Louisiana, fronting on the Mississippi River, and known as the "Harrisfield Tract," which included 153.36 acres lying between the landside toe of an older levee along the edge of the river and the riverward edge of the borrow pits of a newer levee set back therefrom.

The older levee will hereinafter be referred to as the "old levee," the levee set back therefrom as the "set-back levee," and the parcel of 153.36 acres as the "Kirch Tract."

2. When plaintiff became the owner of the Harrisfield Tract, its protection from flood waters of the Mississippi consisted of a levee that had been built in 1879, with cut-offs and changes made in 1907 and 1915.

In 1925 there was set back therefrom a levee built to the standard grade and section established along that stretch of the river in 1914 termed herein the old levee.

In 1931, there was set back from the old levee, another levee, built to a new standard grade and section established in 1928, and referred to herein as the set-back levee.

The protective system had been set back from time to time because of the continued erosion of the right bank of the Mississippi River in that particular territory.

The levees of 1879 and 1925 had cut across or riverward of the Harrisfield Tract, and the set-back levee of 1931 touched the tract on the west side, a small portion thereof being used as right-of-way, so that the tract was not protected by the set-back levee of 1931.

As a result of constant erosion of the right bank, Louisiana side, a large portion of the Harrisfield Tract has gone out into the river.

There is no claim in this suit for the taking of any land or property, or of any right therein, between the old levee

(levee of 1925) and the Mississippi River. The claim is confined to the land and property, or right therein, between the old levee (levee of 1925) and the set-back levee (levee of 1931).

3. The right bank of the river has receded about 3,000 feet in 22 years. In order to arrest this recession, revetments had been placed in the river against the right bank in 1927, 1928, and 1930, alongside and extending beyond the Kirch Tract. These revetments were still in existence in 1936, in a bad state, and had so failed to retard erosion as not to justify their renewal or repair, and they were abandoned and eventually disappeared.

4. In 1930 and 1931 the defendant, by its own forces and by contract, both under the supervision of the Corps of Engineers, U. S. Army, constructed the newer set-back levee. This set-back levee, being built to the 1928 grade and section, was about three feet higher than the 1914 grade and section according to which the old levee had been constructed.

The set-back levee was tied to the old levee some distance above and below the Kirch Tract, and thereby inclosed the Kirch Tract along with other land within a continuous boundary formed of the old levee and the set-back levee. That portion of the old levee between the two tie-ins was left intact, and beyond the tie-ins the old levee was enlarged and brought up to the 1928 grade and section so that, except for that portion of the old levee between the tie-ins extending along and beyond the river front of the Kirch Tract, the old levee and the set-back levee thereafter formed a continuous and practically uniform levee, the Kirch Tract and other land being to the riverside thereof. In the pocket thus formed of the area of which the Kirch Tract was a part, there was provided no artificial drainage and plaintiff was dependent for drainage on his own efforts, the only available basin for such drainage being the riverside borrow pits of the new set-back levee, which had no outlet.

The new set-back levee was tied into the old levee by the defendant upstream April 25, 1931, and downstream July 11, 1931.

5. Upon the construction of the set-back levee and its union with the old levee, the old levee between the two

tie-ins was left to the destructive effect of natural forces. The river continued its approach to the old levee in front of the Kirch Tract, and in 1937, during high water, caved in the old levee at that location and flooded the Kirch Tract to a depth of 12 to 14 feet. Toward the river the Kirch Tract is somewhat higher than at the set-back levee, but in general the land is typically flat. The inundation lasted about 60 days, beginning about the first week in February of 1937, and deposited one to three feet of mixed sand and dirt on about 15 acres. In consequence of the flooding the land did not dry out in time to make the usual crops. Before the old levee had been thus breached, and after the Kirch Tract had been pocketed by the set-back levee, as described, there had been twice left on the land standing water, toward the set-back levee or lower side, to a depth of about four inches, with no outlet. This water had accumulated through rain and seepage.

In 1927, previous to the construction of the set-back levee, the old levee had broken some distance upriver from the Kirch Tract and had flooded the whole countryside, including the Kirch Tract. Prior to 1937 the old levee had not been breached in front of the Kirch Tract.

6. The break-down of the old levee in 1937, in front of the Kirch Tract, was not due to the presence of the set-back levee. The improvements on the land were seriously damaged and some of the structures were carried out into the river and lost, and the value of all of them is practically gone. The soil, theretofore tillable, can still be cultivated and made to yield the usual crops except that due to the sometimes tardy drainage of waters, crops may not always be planted in time to yield a due harvest.

On account of the loss of his improvements and the hazards of high water, plaintiff does not now live upon the land, as he did heretofore, and cultivates the land and raises crops thereon only under the disadvantages described.

7. The Kirch Tract for agricultural purposes compared favorably with land in the vicinity before and after the construction of the set-back levee. Plaintiff's land had been rented at $10 an acre per year for a period of five or six years prior to erection of the set-back levee.

8. As long as the old levee was being maintained, up to the time that the set-back levee was tied in thereto above and below the Kirch Tract, the Kirch Tract was fairly worth $100 an acre, the value prevailing for alluvial lands in the vicinity. As soon as it became apparent that the Kirch Tract would no longer be protected by the levee system, that is, that it would be thrown out riverward of the set-back levee, and that the set-back levee would in effect be substituted for the old levee, the Kirch Tract became valueless both for loan purposes and for sale. Its only use has been for cultivation of crops, subject to interference of high water, seepage, and lack of quick drainage, and subject to gradual loss from riparian erosion.

Plaintiff is still in possession of the Kirch Tract and no claim thereto has been or is being made by the defendant.

9. No part of plaintiff's land was used or encroached upon by the defendant in constructing the new or set-back levee in 1931. The defendant has not torn down, removed, degraded, or otherwise impaired any part of the old river-front levee on which plaintiff's land bounds on the east. The new construction by the defendant has not affected the fertility of the soil nor interfered in any way with its annual cultivation, cropping, or productivity. Plaintiff has not been ousted by the defendant from or deprived of the use or enjoyment of his property, or any part thereof, in consequence of such new levee construction. Plaintiff's damages, as far as any act of the Government is concerned, are indirect and consequential, due to superflood conditions and other natural causes which the United States could not control and was under no obligation to control.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In view of the facts disclosed by the record and as set forth in the findings, we are of opinion that there has been no taking of plaintiff's property within the meaning of the Fifth Amendment and that plaintiff is, therefore, not entitled to recover. The set-back levee constructed and com-

pleted by defendant in 1931 did not cause the caving in of the bank upon which the old river-front levee was situated and the eventual crevassing of that levee and the overflowing of plaintiff's land. In the flood-control legislation and in the acts of the Government designed to carry out the program of such legislation, the Government assumed the lead and took upon itself the effort of controlling the flood waters of the Mississippi River for the purpose of improving the navigability of that river and for the purpose of protecting as much land and property along the Mississippi from the ravages of floods as far as it was feasible and possible to do so. However, the flood control act did not, in itself, assume responsibility to an owner of riparian land for damages that might be consequential or that might arise as an incident to the construction of levees along the Mississippi River or the construction of set-back levees. Nor did the act assume responsibility for damages to private property which might, as in the case at bar, result from the failure of the Government to construct and maintain a riverside levee of sufficient grade and strength as would insure an owner, whose land lay immediately behind such old levee, against the natural consequences of encroachment of flood waters of a river upon that levee. Plaintiff's claim for a taking can have its foundation only upon the assertion that it was the duty of the Government to provide complete protection to lands situated behind the old river-front levee. The Government is under no legal obligation to construct and maintain levees that will protect every riparian owner. *Jackson* v. *United States*, 230 U. S. 1. Neither is the Government under legal duty to respond in damages for injuries that may result from surrounding or encircling land by a set-back levee and a river-front levee. *Hughes* v. *United States*, 230 U. S. 24. The flood-control act in itself furnishes no legal basis for the payment of consequential damages by reason of depression in the market value of property. In *United States* v. *Sponenbarger et al.*, 308 U. S. 256, the court, at page 264, stated that "Loss in market value of respondent's property, since 1927, has not been caused by any action of the Government, but is due to the flood of 1927, the depression, and

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other causes unconnected with the governmental program under the 1928 Act. The United States has in no way molested respondent's possession or interfered with her right of ownership." And, further, at page 266, the court said "* * * and the Fifth Amendment does not make the Government an insurer that the evil of floods be stamped out universally before the evil can be attacked at all." In *Vansant* v. *United States*, 75 C. Cls. 562, this court held that depreciation in market value does not, in itself, constitute a taking of property; and the cases of *Jackson* v. *United States*, *supra*, *Hughes* v. *United States*, *supra*, and *United States* v. *Sponenbarger et al.*, *supra*, hold that the raising of levees in one locality or the failure to raise them in another so as to afford equal protection of all landowners does not constitute a taking under the Fifth Amendment. See, also, *A. J. Matthews, as Trustee for R. W. Owen et al.* v. *United States*, 87 C. Cls. 662. Plaintiff is still in possession of his land and even after the disastrous flood of 1937, which crevassed the river-front levee, he cultivated the land. It cannot, therefore, be said that plaintiff has been ousted of possession and use of his property by any act of the Government, or that the Government has taken his property for public purposes within the meaning of the Fifth Amendment.

The petition will therefore be dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

MARYLAND CASUALTY COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43840. Decided May 6, 1940]

On the Proofs

Income tax; right of subrogation of surety.—Where plaintiff as surety for taxpayer on a certain income and profits tax bond had paid the taxes, interest and penalties claimed to be due the defendant by taxpayer, it is held that plaintiff became subrogated to all of taxpayer's rights in the matter.

Same.—The right of subrogation extends not only to the rights and remedies of the creditor but also to those of the principal on the bond.

Same.—Where in a suit in the Federal Courts, in which suit the validity of the taxes covered by an income and profits tax bond on which plaintiff was surety was not adjudicated, not being in issue, and plaintiff was held to be liable on said bond, it is held that while plaintiff was bound by its contract, whether the alleged taxes were legal or illegal, after payment of said taxes plaintiff had the right to test the validity and merits of the taxes, under the doctrine of subrogation and contractual relationship with the United States.

Same; decree of referee in bankruptcy final.—Where taxpayer, after the assessment of certain taxes for the year 1925, was in the year 1929 adjudged a bankrupt; and where in the bankruptcy proceedings the defendant through its collector of internal revenue filed a statement of a claim for said taxes, but no evidence was introduced on behalf of the collector or the defendant and there was no appearance of counsel for either; and where the referee in bankruptcy found that the claim for said taxes was not due and payable and decreed that the claim be disallowed, no appeal from said decree being taken and no further action in the matter being taken by defendant, it is held that the decision of the referee in bankruptcy was final.

Same.—The judgment of a referee in bankruptcy upon the merits of a claim presented in behalf of the United States by a party duly authorized to act, from which judgment no appeal was taken, was in effect the judgment of a court and entitled to the same credit and standing.

The Reporter's statement of the case:

Mr. Robert C. Handwerk for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is and, during all the times material to these proceedings, was a Maryland corporation with its principal place of business in Baltimore.

May 26, 1927, plaintiff, under circumstances which will hereinafter appear, filed a bond in connection with an in-

come tax assessment which had been made against Robert C. Lindsay, a partner in the Lindsay Lumber Company.

2. The Lindsay Lumber Company (hereinafter sometimes referred to as the "partnership") was organized as a partnership in May 1924, and the members of the partnership for the remainder of that year and throughout the year 1925 were George R. and Robert C. Lindsay. It was engaged in the retail lumber business at Miami, Florida. Prior to the formation of this partnership the two partners had been engaged in the wholesale lumber business, but on a different basis for sharing profits and losses.

3. During the calendar year 1925 the Florida boom was at its height in Miami, and the fall of that year was one of the busiest seasons ever experienced there in the lumber industry. Up to the end of 1925 building operations were still very active in Miami and the demand for lumber was in excess of the supply. During 1925 a railroad serving Miami placed a limited embargo on shipments of lumber into that city, with the result that during a great part of that year it was exceedingly difficult to get shipments of lumber by rail. One means employed to meet the demand was through shipments by water and a large amount of lumber was shipped into Miami in that manner. However, during November or December 1925, while the embargo was still in effect on rail shipments, a vessel sank in the channel of Miami harbor and prevented the larger vessels from landing. The sunken vessel remained in the harbor approximately three or four weeks and when it was removed the large number of vessels which had collected in the harbor came in as rapidly as possible, unloaded their cargoes, and thus made available a substantial supply of lumber.

In the forepart of 1926 there began to be some relief from the rail embargo and more shipments of lumber began to come into the city. However, at December 31, 1925, the demand for lumber was in excess of the supply and no break had yet occurred in the lumber market. After the congestion in shipping facilities by rail was relieved in January or February 1926, large quantities of lumber which had been delayed in transit began arriving in Miami and de-

pressed the price of lumber, though a reduction in price was not felt to any appreciable extent until about March 1926. Beginning about that time there was a very severe drop in the price of lumber, with the result that within two or three months many lumber concerns were selling lumber at almost any price they could obtain for it.

At December 31, 1925, the market price of lumber held by the Lindsay Lumber Company was higher than its cost to that partnership.

4. March 15, 1926, the partnership filed its partnership return of income for the calendar year 1925, disclosing a net income of $107,801.22 and the allocation of that income in equal parts to the two partners, except with respect to a small amount of income from a mill plant, which was allocated 75 percent to George R. Lindsay and 25 percent to Robert C. Lindsay. In that return a deduction was claimed for bad debts in the amount of $10,223.78. Attached to that return was a certificate of inventory which stated that the entire closing inventory for that year amounted to $84,507.01, and in answer to the question whether the inventory was taken on the basis of "cost" or "cost or market, whichever is lower," stated that the inventory was priced on the basis of "cost." The inventory as used in the return of the partnership for the period during which it operated in 1924 was also priced on the basis of "cost."

5. June 15, 1926, the partnership filed an amended return of income for the calendar year 1925, disclosing a net income of $85,600.87. Attached to that return was a certificate of inventory similar to that referred to in connection with the original return, showing a closing inventory of $85,613.44, and that the basis of pricing all elements entering into its inventory was "cost or market, whichever is lower." The decrease in the net income shown in that return as compared with that in the original return of $22,200.35 was due solely to changes in the pricing of material bought during the year and of material in its closing inventory, namely, an increase in the item of merchandise bought for sale from $520,044.41, as shown in the original return, to $543,352.19, that is, an increase of $23,307.78, and an increase in the inventory at the end of the year from $84,506.01, as shown

in the original return, to $85,613.44, that is, $1,107.43, making a net decrease in net income of $22,200.35.

6. July 6, 1927, the partnership filed a second amended return for the year 1925, disclosing a net income of $72,786.92, and that return had attached thereto a certificate of inventory similar to those previously referred to, stating that all items entering into its closing inventory, then shown at $80,251.23 instead of $85,613.44 as shown in the first amended return, were priced on the basis of "cost or market, whichever is lower." Besides the change in the closing inventory just referred to, the only other change made in that return from that shown in the previous return was an increase in the deduction claimed for bad debts from $10,223.78, shown in the original and first amended returns, to $17,675.52, shown in the second amended return. These additional bad debts claimed as a deduction in the second amended return were not written off the partnership books until subsequent to December 31, 1925, namely July 30, 1927, and the evidence is insufficient to support a finding that they were determined to be worthless during the year 1925.

7. March 15, 1926, Robert C. Lindsay filed his individual income-tax return for the calendar year 1925, disclosing a gross income of $53,426.44, a net income of $51,398.14, and a tax liability (after the correction by the collector of a clerical error) of $5,232.49, which was duly assessed and thereafter partially paid as follows:

March 15, 1926	$1, 308. 51
June 25, 1926	374. 58
September 15, 1926	841. 55
Total	2, 524. 64

Of the gross income disclosed on that return $53,117.44 was shown as having been received from the Lindsay Lumber Company.

8. On or about June 12, 1926, Robert C. Lindsay filed an amended return for the year 1925, disclosing a gross income of $42,326.27, a net income of $40,297.97, and a tax liability of $3,366.18. That return differed from the original return only to the extent of a reduction of $11,100.17 in the income reported from the Lindsay Lumber Company, which re-

sulted from the changes in the first amended return of the partnership referred to in finding 5.

9. July 6, 1927, Robert C. Lindsay filed a second amended return for the year 1925 reporting a gross income of $35,-919.29, a net income of $33,890.99, and a tax liability of $2,428.05. That return differed from the first amended return only to the extent of a reduction in the amount of $6,406.98 in the income reported from the Lindsay Lumber Company, which resulted from the changes in the second amended return referred to in finding 6.

Both the first and the second amended returns filed by Robert C. Lindsay were filed by him in order to give effect to the changes made by the partnership in the amended returns filed by it and heretofore referred to.

10. In connection with the filing of the second amended return, and on the same day that return was filed, Robert C. Lindsay filed a claim for abatement and refund of income tax for the year 1925, in which he asked for abatement of $2,707.85 and refund of $96.59 on the following grounds:

> Second amended partnership return for 1925 of Lindsay Lumber Co. has been submitted for filing on which the taxpayer's share in the net profits from this partnership has been reduced by $17,507.15 from the original return and $6,406.98 from the first amended return. Second amended return of the taxpayer is submitted for filing herewith on which the taxpayer's correct income from the partnership is stated according to the partnership's second amended return—

The tax assessed on the original return was	$5, 232. 49
The tax as shown by the second amended return is	2, 428. 05
The tax overassessed is therefore	2, 804. 44

> The taxpayer has paid $2,524.64, the tax shown by second amended return is $2,428.05 and the amount overpaid of $96.59 is respectfully claimed for refund.

11. On or about May 26, 1927, Robert C. Lindsay as principal and plaintiff as surety executed the following "income and profits tax bond," which was duly filed with the collector:

> Know all men by these presents, That Robert C. Lindsay, of Miami, Florida, as principal, and Maryland Casualty Company, as surety, are held and firmly bound

unto the United States of America in the sum of Four Thousand and 00/100ths dollars ($4,000.00), lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas there is due from the above-bounden principal certain additional income or profits taxes resulting from a deficiency in tax (not due to negligence or to fraud with intent to evade tax);

Whereas to exact payment of the deficiency in tax at this time will result in undue hardship to the above-bounden principal;

Whereas section ---- of the Revenue Act of ------ provides that the Commissioner, with the approval of the Secretary, may extend the time for the payment of such deficiency in tax, or any part thereof, for such period as may be considered necessary not in excess of eighteen months, and provides further that the Commissioner may require the taxpayer to furnish a bond with sufficient sureties conditioned upon the payment of the deficiency in accordance with the terms of the extension granted; and

Whereas it appears that the amount of this bond is sufficient to cover the deficiency of tax plus penalty and interest:

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on or before the 26th day of May 1928 pay such deficiency in tax found to be due by the Commissioner, plus penalty and interest, in accordance with the terms of the extension as herein stated, and shall otherwise well and truly perform and observe all the provisions of law and the regulations;

Then this obligation is to be null and void, but otherwise to remain in full force, virtue, and effect.

The terms of the extension are as follows:

That the Internal Revenue Department will refrain from placing a lien on the property of Robert C. Lindsay until the matter in abatement shall be decided.

12. Subsequently, after an examination by a revenue agent, the Commissioner determined an overassessment of $85.65 in favor of Robert C. Lindsay, as follows:

Tax assessed, original return	$5,232.49
Tax assessable	5,146.84
Overassessment	85.65

Pursuant to that determination the Commissioner issued a certificate of overassessment to Robert C. Lindsay in the amount so shown and duly abated $85.65 of the tax which had been previously assessed but not paid. The effect of this action was to disallow the claim in its entirety insofar as it pertained to a refund, to allow the part of the claim relating to abatement to the extent of $85.65, and to disallow the balance of the claim relating to abatement, thus leaving $2,622.20 outstanding and unpaid for 1925.

13. In the meantime and prior to the issuance of the certificate of overassessment, bankruptcy proceedings had been instituted in the United States District Court for the Southern District of Florida against George R. Lindsay and Robert C. Lindsay individually and as copartners trading as the Lindsay Lumber Company. On or about May 16, 1928, the collector of internal revenue for the collection district of Florida filed a claim with the referee in bankruptcy in that proceeding, alleging that Robert C. Lindsay was indebted to the United States for income taxes and interest, as follows:

Balance of tax due for 1925	$2,707.85	
Interest at 12% on the balance of the unpaid assessment for 1925, from August 15, 1926, to May 15, 1928	541.57	
		$3,249.42
Additional tax for 1920	290.32	
Interest assessed on the additional tax for 1920	10.14	
Interest accrued on the additional tax for 1920 from September 25, 1926, to May 16, 1928	57.16	
		357.62
		3,607.04

14. On or about December 4, 1928, Robert C. Lindsay filed with the referee in bankruptcy specifications of objections to the allowance of the claim of the collector referred to in the previous finding, alleging that no part of such claim was due and owing to the United States, that in lieu of such claim there was then due and owing from the United States on account of the income-tax payments theretofore made by

Robert C. Lindsay, a refund of $96.59, and that an abatement bond with Robert C. Lindsay as principal, plaintiff as surety, and the collector of internal revenue as beneficiary, in the amount of $4,000, had been filed in connection with an outstanding assessment against Robert C. Lindsay and that the abatement bond was still valid and subsisting.

15. The claim of the collector against Robert C. Lindsay and the specifications of objections filed thereto came on to be heard before the referee in bankruptcy January 10, 1929, and were continued to January 14, 1929, at which time evidence was presented on behalf of Robert C. Lindsay, the alleged bankrupt, but no evidence was introduced on behalf of the collector, nor was there any appearance of counsel for the collector. In that proceeding it was contended by or on behalf of Lindsay, and testimony was offered to that effect, that the price of all elements or items in the partnership inventory at December 31, 1925, was lower than their cost to the partnership and that the partnership should be permitted to price its inventory on the basis of cost or market, whichever was lower, regardless of the fact that the inventories in its return for 1924 and in its original return for 1925 were priced at cost. In seeking to establish that the partnership should be permitted to price its inventories in that manner at December 31, 1925, testimony was also offered as to the effect on the lumber market at that time of a certain rail embargo on the shipment of lumber to Miami and the effect on the market of the sinking of a vessel in the Miami channel during the latter part of 1925, which, for a time, prevented other schooners from unloading. A further issue presented at the same time, in support of which testimony was offered, was whether the partnership was entitled to a deduction for the additional bad debts claimed in its second amended return.

Since the amended returns filed by Robert C. Lindsay, on the basis of the amended partnership returns which made the above adjustments in the manner contended for by Lindsay, produced an overassessment for 1925 in the approximate principal amount asked in the collector's claim filed with the referee for that year, Lindsay, as the alleged bankrupt, asked that the collector's claim be disallowed.

16. January 28, 1929, the referee in bankruptcy entered his order in the proceedings heretofore referred to, in which he disallowed in its entirety the claim of the collector for additional tax and interest for 1925 from Robert C. Lindsay in the amount of $3,249.42, referred to in finding 13, and allowed the claim of $357.62 for 1920, plus interest in the amount of $23.24 from May 16, 1928, to January 17, 1929. The additional tax and interest for 1920 are not involved in the present proceeding before this court.

17. Thereafter the United States instituted suit in the United States District Court for the Southern District of Florida on the bond set out in finding 11. In response to that suit the plaintiff set up as a defense the plea that Robert C. Lindsay had been adjudged a bankrupt in that court, that the collector of internal revenue filed a claim in bankruptcy for the additional tax in question, that the trustee in bankruptcy filed exceptions to the allowance of the claim, and that the exceptions were sustained by the referee and the claim disallowed, which facts, it was asserted, constituted a complete defense to that cause of action.

May 4, 1934, the District Court rendered its decision (*United States* v. *Maryland Casualty Co.*, 8 Fed. Supp. 1020), to the effect that the determination by the referee in the bankruptcy court, as between Robert C. Lindsay and the Government, did not release the surety nor affect the right of action upon the bond, and accordingly on August 7, 1934, rendered judgment in favor of the United States for $5,689.51, which included the balance of the assessment of income tax for the year 1925 of $2,622.20, with interest thereon, and the income tax for 1920 in the amount of $290.32, with interest thereon.

From that judgment plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which court on March 23, 1935, partially affirmed and partially reversed the decision of the District Court, allowing recovery under the bond up to its face amount and reversing with respect to certain interest adjustments, and remanded the case to the latter court with directions to enter judgment accordingly. *Maryland Casualty Co.* v. *United States*, 76

Fed. (2d) 626. As a result of that decision of the Circuit Court of Appeals, the United States District Court for the Southern District of Florida on July 8, 1935, entered judgment against plaintiff in the amount of $5,052.23, which included the principal and interest at the legal rate asserted for 1925 and the principal and interest for the year 1920, the latter aggregating $440.32 and not being claimed by plaintiff in this suit.

18. July 12, 1935, plaintiff paid to the collector of internal revenue the amount of the judgment referred to in the preceding finding, $5,052.23, with costs of $77.52, and thereafter satisfaction of that judgment was duly entered on the records of the United States District Court for the Southern District of Florida.

19. July 1, 1937, Robert C. Lindsay filed a claim for refund for the calendar year 1925 and described the amount to be refunded as "balance of assessment for 1925, $2,622.20, and int. plus $96.59 and int., and penalties, court costs, and actual expenses." The grounds assigned for the claim were that the original partnership return of income of the Lindsay Lumber Company for 1925 had overstated its net income by reason of the fact that its inventory was taken at cost price instead of market price, which was lower than cost; that in the same return the Lindsay Lumber Company had failed to take a deduction from its gross income for the year 1925 for certain bad debts in the amount of $7,451.74 in addition to the bad debts originally claimed in that return; that these two adjustments proportionately affected Robert C. Lindsay's distributive income from the partnership, and their adjustment in the manner claimed by Lindsay would produce the refund claimed; and further, that since prior to the payment by plaintiff, pursuant to the judgment of the District Court as set out above, the claim of the Government for the taxes which were thus paid was considered by a referee in bankruptcy and the claim disallowed, the matter is *res judicata* and the action of the bankruptcy court is binding upon the Government.

20. On or about July 2, 1937, plaintiff filed a claim for refund for 1925 in which refund was asked of the same

amounts as were set out in the claim for refund filed by Robert C. Lindsay as shown in finding 19. Plaintiff assigned the following reasons for recovery:

> 1. This claim is filed by the Maryland Casualty Company, a corporation, surety for the taxpayer, Robert C. Lindsay, by virtue of the statements set forth in paragraph 6 of the annexed reasons and authorities, the above-mentioned taxes, interest, and penalties, etc., having been paid by said Maryland Casualty Company to the United States Government in behalf of said taxpayer by virtue of a certain income- and profits-tax bond dated May 26, 1927.
>
> 2. Please see attached statement of reasons and authorities which are attached hereto and made a part of this claim.

The reasons and authorities which were attached to that claim were substantially the same as those assigned in connection with the claim for refund filed by Robert C. Lindsay and referred to in finding 19.

21. October 12, 1937, the Commissioner advised Robert C. Lindsay that his claim would be disallowed for the reasons that the tax sought to be recovered had not been paid by Lindsay but by his surety under the bond which had been filed as heretofore shown, and that the Bureau was precluded from considering the case on the merits since the tax liability for that year had been closed by a decision of a court of competent jurisdiction. The claim was officially rejected February 17, 1938.

22. October 25, 1937, the Commissioner advised plaintiff that its claim would be disallowed and, after reciting the circumstances heretofore referred to in this report with respect to the filing of a bond, the bringing of suit thereon and the collection under the bond, gave as the reason for the rejection of the claim that "the judgment rendered by the court in the instant case acts as a bar to action by the Unit, which is precluded from consideration of the refund claim on its merits, * * *." The claim was officially rejected February 17, 1938.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

There is no substantial dispute between the parties as to the facts in the case which, so far as material to the legal questions involved, may be summarized as follows:

Plaintiff, as a corporate surety, on May 26, 1927, executed a bond in favor of the defendant for the payment of a deficiency in taxes, including the year 1925, assessed against Robert C. Lindsay, as principal and taxpayer. Subsequently, as shown by the findings, the taxpayer filed a first and then a second amended return of his tax liability for this year. The second amended return showed an overassessment of $2,804.44. Simultaneously with the filing of the second amended return and while the bond was in full force and effect, the taxpayer filed a claim for abatement and refund of the income tax for the year 1925 in which he requested abatement of $2,707.85 and the refund of $96.59. Thereafter, the Commissioner allowed part of the claim for abatement to the extent of $85.65 and discharged the remainder thereof.

In the meantime, bankruptcy proceedings had been instituted in the United States District Court for the Southern District of Florida. About May 16, 1928, the defendant, acting through its collector of internal revenue, filed in the bankruptcy proceedings a statement of a claim for taxes due the United States in the matter of Robert C. Lindsay, bankrupt, claiming a balance of tax due for 1925 in the principal sum of $2,707.85, with interest. On or about December 4, 1928, the taxpayer (Robert C. Lindsay) filed in the bankruptcy court objections to this claim, stating that no part of it was due and owing to the defendant but, on the contrary, there was due and owing to the taxpayer a refund of $96.59.

The claim for taxes against Lindsay came on to be heard before the referee in bankruptcy in January 1929 and evidence was presented on behalf of the taxpayer and bankrupt, but no evidence was introduced on behalf of the collector or the defendant, nor was there any appearance of counsel for either. On January 28, 1929, the referee in bankruptcy signed an order in which he made a finding that

the claim of the defendant for income taxes on the bankrupt for 1925 in the sum of $3,249.42 was not due and payable, and adjudged and decreed that the claim of the defendant for balance of tax for 1925 with interest in the total amount of $3,249.42 be disallowed. There was no appeal by the defendant from this order and defendant took no further action in connection therewith.

Thereafter, as shown by Finding 17, defendant filed a suit in the District Court of the United States for the Southern District of Florida against the plaintiff herein on the bond above mentioned. In response to that suit, the plaintiff set up as a defense the plea that Robert C. Lindsay had been adjudged a bankrupt in that court, that the collector of internal revenue filed a claim in bankruptcy for the additional tax in question, that the trustee in bankruptcy filed exceptions to the allowance of the claim, and that the exceptions were sustained by the referee and the claim disallowed, which facts, it was asserted, constituted a complete defense to that cause of action. May 4, 1934, the District Court rendered its decision in this case to the effect that the determination by the referee in the bankruptcy court, as between Robert C. Lindsay and the Government, did not release the surety or affect the right of action on the bond, and entered judgment in favor of the United States for $5,689.51, which included the balance of the assessment of income tax for 1925 of $2,622.20, with interest thereon, and the income tax for 1920 in the amount of $290.32, with interest thereon. An appeal was taken from this judgment to the United States Circuit Court of Appeals which court affirmed the decision of the District Court so far as to allow recovery on the bond up to its face amount, reversing with respect to certain interest adjustments, and remanded the case to the latter court with direction to enter judgment. Accordingly, on July 8, 1935, the United States District Court for the Southern District of Florida entered judgment against plaintiff in the amount of $5,052.23, which included the principal and interest at the legal rate asserted for 1925, and the principal and interest for the year 1920, the latter

aggregating $440.32 and not being claimed by plaintiff in this suit. July 12, 1935, plaintiff paid the amount of this judgment with costs of $77.52.

July 1, 1937, Robert C. Lindsay filed a claim for refund for the year 1925 describing the amount to be refunded as "balance of assessment for 1925, $2,622.20, and interest, plus $96.59 and interest, and penalties, court costs, and actual expenses," and setting out definitely the grounds of the claim; further that plaintiff had paid the judgment of the District Court as shown above; that the claim of the Government for the taxes which were thus paid had been considered by a referee in bankruptcy and the claim disallowed; that the matter is *res adjudicata*, and the action of the bankruptcy court is binding upon the Government.

About July 2, 1937, plaintiff filed a claim for refund for 1925 in which there was asked the same amount as was set out in the claim for refund filed by Robert C. Lindsay as stated above. The grounds of the claim were in substance that the plaintiff, as surety for the taxpayer Robert C. Lindsay, had paid the taxes, interest, and penalties claimed to be due the defendant in behalf of said taxpayer by virtue of a certain income and profits tax bond, and otherwise the same as had been set up by Lindsay in his claim for refund referred to above.

The claims for refund filed by Lindsay and the plaintiff were both disallowed by the Commissioner in October 1937, and officially rejected February 17, 1938, for reasons stated in Findings 21 and 22.

It will be observed that two judgments were entered in the case: one by the referee in bankruptcy that there was nothing due from Lindsay on the tax for the year 1925, as claimed by the defendant; the other rendered by the District Court holding plaintiff liable upon the bond which had been given for the payment of these taxes. The plaintiff contends that the judgment rendered by the referee in bankruptcy is a final adjudication in its favor and entitles it to recover the amount which it paid on the taxes for 1925. The defendant, on the contrary, insists that the judgment

rendered in its favor upon the bond is conclusive that the taxes in controversy were due and owing from Lindsay and makes the matter *res adjudicata* against the plaintiff. The contention of the defendant will first be taken up.

We think the argument on behalf of the defendant as to the effect of the suit and judgment on the bond is not well founded. This suit was not concerned with the merits of the 1925 taxes. The plaintiff was bound by its contract whether the alleged taxes were legal or illegal; but after such payment, under the doctrine of subrogation and contractual relationship with the United States, the plaintiff had the right to test the validity and merits of the taxes.

The suit on the bond did not involve the validity of the taxes. That issue could not be raised therein and consequently was not adjudicated. It was a distinct and independent proceeding to collect taxes which had been assessed. The defendant had the right to collect them and could not be restrained or defeated in the action on the bond by any proceedings in the bankruptcy court. See *United States* v. *Maryland Casualty Co.*, 8 Fed. Supp. 1020. But, as stated in the last paragraph of the opinion of the case above cited, the taxpayer had a remedy. It could pay the tax and bring suit for a refund. See also *Maryland Casualty Co.* v. *United States*, 76 Fed. (2d) 626. The suit in the District Court adjudicated the defendant's right to collect the taxes which were prima facie due and owing, having been assessed, but, if illegally assessed, could be recovered by proper proceedings. *Graham* v. *Du Pont*, 262 U. S. 234. Having as surety paid a liability of the taxpayer, the plaintiff became subrogated to all of his rights in the matter.

The right of subrogation extends not only to the rights and remedies of the creditor but also to those of the principal on the bond. 60 C. J., sec. 81, p. 771, citing numerous cases. By reason of the payment of the bond, the plaintiff became subrogated to all the rights of the taxpayer with reference to a refund of the taxes.

The judgment of the referee in bankruptcy stands in an altogether different light from the judgment on the bond.

Under the statute and all the decisions, the judgment rendered by him was in effect the judgment of a court and entitled to the same credit and standing. The judgment was not only upon the merits but entered upon a claim presented in behalf of the United States by a party duly authorized to act for the defendant.

It may be, as contended by defendant, that it now appears that the decision of the referee in bankruptcy was contrary to the actual facts in the case. But if so, there should have been an appearance for the collector or the defendant before the referee when the claim was heard and evidence introduced in behalf of defendant, or at least an appeal taken from the decision. Neither the defendant nor any of its representatives did anything, although an opportunity was given for a hearing and there was nothing to prevent an appeal. Under these circumstances, the decision became final.

Counsel for defendant cite a number of cases which hold that in suits against a collector his liability is not official but personal and for this reason a judgment in a suit in which he was a party defendant does not conclude the Commissioner or the United States. But the suit before the referee was not that kind of a case. It was on a claim presented by the duly authorized agent of the United States and the judgment entered therein is *res adjudicata* against both the Commissioner and the United States. Its effect was conclusive in favor of the plaintiff and its application for a refund which should have been allowed to the extent of the payment of the amount of the 1925 taxes and interest which was made upon the bond. This, the findings show, was $4,611.91.

Judgment will accordingly be entered in favor of the plaintiff for $4,611.91 with interest as provided by law. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE NAVYTONE COMPANY v. THE UNITED STATES

[No. 43728. Decided May 6, 1940]

On the Proofs

Government contract; delay in completion.—Where plaintiff, a manufacturer of clothing, agreed to deliver to the Government a certain number of coats within an agreed period at stipulated intervals, and where there was delay in delivery for which the Government deducted an amount representing liquidated damages, it is held that evidence adduced does not establish that such delay was due to the Government's failure to make prompt inspection of coats manufactured and tendered for inspection and acceptance.

Same; decision of contracting officer.—Where contract provided that the decision of the contracting officer should be final on all questions of fact and where the contracting officer found that the plaintiff and not the Government was responsible for the delay in completion of the contract, no appeal having been taken from the decision of the contracting officer, it is held that the findings of the contracting officer were not arbitrary, unreasonable or grossly erroneous.

The Reporter's statement of the case:

Mr. Edward Gallagher for the plaintiff.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff sues to recover $6,282.64, representing the amount of liquidated damages deducted by the defendant from the balance due plaintiff for delay beyond the period specified in the contract for the manufacture and delivery by plaintiff of 110,000 coats for the Civilian Conservation Corps pursuant to and in accordance with a contract with the War Department.

Plaintiff insists that the delay in completing the contract on time was caused by the defendant and that the stipulated damages for delay should not have been deducted and withheld from the balance otherwise due under the contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff entered into a contract with the defendant bearing the date of June 17, 1935, whereby plaintiff agreed to furnish and deliver at the Philadelphia Quartermaster Depot, 21st and Johnston Streets, 110,000 woolen coats at $1.07 each for the Civilian Conservation Corps in accordance with a schedule of supplies, with certain specifications, and with plaintiff's bid, deliveries to be made 7.6% within 24 days after date of receipt of first shipment of Government material and 8.4% each seven days thereafter.

The Government was to furnish the material for the coats, so much being allowed for each coat, the contractor to pay for any excess material used.

2. In the invitation for bids, the specifications, and plaintiff's proposal, all of which were made a part of the contract, it was stated: "Bidders are informed that the term 'Delivery' is interpreted to mean the receipt, at destination depot, of acceptable articles."

Liquidated damages were provided for, in case of failure to make timely delivery, at a rate of 0.2% of the price of each unit for each calendar day of delay.

All clippings, remnants, unused materials, rejected garments not possible of correction, and garments manufactured in excess of the number covered by the contract, whether acceptable or not, were to remain the property of the Government.

The invitation for bids contained also the following:

> The contractor will be required to furnish bond in an amount equal to the value of the maximum quantity of material he will require to have in his possession at any one time to enable him to manufacture the garments and make deliveries contracted for plus 20% of the amount of the contract. For the purpose of arriving at the approximate amount of the bond, the value of Government materials should be figured at $3.50 per coat.* * *
>
> This bond will serve as a guarantee to protect the Government against failure of the contractor to satisfactorily complete his contract and against any loss or damage whatsoever of materials furnished the contractor by the Government.

3. Performance bond was furnished by the plaintiff and accepted by the Government in the penal sum of $135,400. This was 20% of the amount of the contract, plus $111,860, and was calculated to entitle plaintiff to have and keep on hand sufficient material for 31,960 coats.

Plaintiff's estimate of the amount of material necessary to have and keep on hand in order to enable it to make the deliveries as agreed was for about 30,000 coats. This amount of stock would decline in amount toward the end of the contract period.

Copies of the contract, with bid, invitation for bid, schedule of supplies, and bond for performance, are filed in the case and made a part of these findings by reference.

4. The first shipment of Government material was received by the plaintiff June 26, 1935. This fixed October 5, 1935, as the last date for final delivery of acceptable garments under the following schedule:

Deliverable on or before—	Number	Cumulative
July 20, 1935	8, 360	8, 360
" 27, "	9, 240	17, 600
Aug. 3, "	9, 240	26, 840
" 10, "	9, 240	36, 080
" 17, "	9, 240	45, 320
" 24, "	9, 240	54, 560
" 31, "	9, 240	63, 800
Sept. 7, "	9, 240	73, 040
" 14, "	9, 240	82, 280
" 21, "	9, 240	91, 520
" 28, "	9, 240	100, 760
Oct. 5, "	9, 240	110, 000
	110, 000	

5. If this schedule had been maintained plaintiff would have been entitled to have on hand material for 31,960 coats until the balance of future deliveries began to decrease the amount of such material, September 14, 1935, when the contractor would have been entitled to material for 27,720 coats only; on September 21, 1935, 18,480; and on September 28, 1935, 9,240.

Along with acceptable garments there was proffered by the contractor for delivery under the contract a large pro-

portion of unacceptable garments. Acceptable coats were delivered by plaintiff in quantities and on dates as follows:

1935	Number	1935	Number
July 12	1	Sept. 18	1,733
" 24	585	" 19	1,930
" 25	415	" 20	1,547
" 26	251	" 23	3,813
" 30	393	" 24	1,973
" 31	365	" 25	2,132
Aug. 1	585	" 26	2,330
" 2	518	" 27	1,648
" 5	584	" 30	2,179
" 6	456	Oct. 1	1,556
" 7	590	" 2	1,695
" 8	344	" 3	1,884
" 9	640	" 4	1,602
" 12	655	" 8	2,278
" 13	824	" 9	2,314
" 14	754	" 10	2,283
" 15	686	" 11	3,486
" 16	623	" 14	2,347
" 19	914	" 15	2,018
" 20	712	" 16	1,781
" 21	1,010	" 17	1,705
" 22	1,199	" 18	1,695
" 23	1,389	" 21	1,913
" 26	1,832	" 22	1,222
" 27	1,006	" 23	1,707
" 28	1,701	" 24	1,497
" 29	1,875	" 25	1,782
" 30	2,135	" 28	2,295
Sept. 3	3,170	" 29	1,750
" 4	2,231	" 30	1,743
" 5	1,401	" 31	1,222
" 6	2,269	Nov. 1	684
" 9	2,271	" 4	682
" 10	2,016	" 15	2,395
" 11	1,753	" 18	306
" 12	1,672	Dec. 3	310
" 13	1,385	" 6	14
" 16	2,026		
" 17	1,318		110,005

6. On October 14, 1935, the accumulated deliveries amounted to 80,937 coats, with 29,063 remaining undelivered under the contract. Thereafter the amount of material not made up into delivered garments, which plaintiff was entitled to have on hand under its bond, progressively decreased as acceptable garments were delivered from time to time.

7. The material in the construction of unacceptable garments, considered as part of the material for the 31,960 coats heretofore mentioned, reduced the material for coats not yet manufactured to which plaintiff would otherwise have been entitled. Taking the material in unacceptable gar-

ments as material furnished within the limit of plaintiff's bond, increasing plaintiff's stock by deliveries of unworked material from the Government, and decreasing it by deliveries of acceptable garments, the material at plaintiff's disposal at the close of the following days was approximately as follows:

1935	Coats for which material furnished	Acceptable coats delivered	Accumulation of material stated in terms of coats	1935	Coats for which material furnished	Acceptable coats delivered	Accumulation of material stated in terms of coats
June 26	5, 221		5, 221	Sept. 12	6, 256	1, 672	23, 655
" 27	7, 388		12, 609	" 13	268	1, 385	22, 538
July 1	5, 505		18, 114	" 16	215	2, 026	26, 727
" 5	2, 733		20, 847	" 17	2, 474	1, 318	21, 883
" 8	2, 765		23, 612	" 18	3, 838	1, 733	23, 988
" 9	1, 302		24, 914	" 19		1, 930	22, 058
" 10	2, 705		27, 619	" 20	6, 877	1, 547	27, 388
" 12	2, 722	1	30, 340	" 23		3, 813	23, 575
" 17	2, 382		32, 722	" 24	3, 278	1, 973	24, 880
" 24		585	32, 137	" 25	2, 947	2, 132	25, 695
" 25		415	31, 722	" 26	2, 878	2, 330	26, 243
" 26		251	31, 471	" 27	2, 311	1, 648	26, 906
" 29	2, 291		33, 762	" 30	2, 527	2, 179	27, 254
" 30		393	33, 369	Oct. 1	2, 360	1, 556	28, 058
" 31		365	33, 004	" 2	2, 099	1, 695	28, 462
Aug. 1	2, 162	585	34, 581	" 3	3, 934	1, 884	30, 512
" 2		518	34, 063	" 4	2, 375	1, 602	31, 285
" 5		584	33, 479	" 8	2, 013	2, 278	31, 020
" 6		456	33, 023	" 9	3, 893	2, 314	32, 599
" 7		590	32, 433	" 10	2, 757	2, 283	33, 073
" 8	2,153	344	34, 242	" 11	1, 090	3, 486	30, 677
" 9	685	640	34, 287	" 14	41	2, 347	28, 371
" 12	934	655	34, 566	" 15		2, 018	26, 353
" 13		824	33, 742	" 16		1, 781	24, 572
" 14		754	32, 988	" 17	17	1, 705	22, 884
" 15		686	32, 302	" 18	10	1, 695	21, 199
" 16		623	31, 679	" 21		1, 913	19, 286
" 19		914	30, 765	" 22		1, 222	18, 064
" 20		712	30, 053	" 23	23	1, 707	16, 380
" 21		1, 010	29, 043	" 24		1, 497	14, 883
" 22	1, 989	1, 199	29, 833	" 25		1, 782	13, 101
" 23	461	1, 389	28, 905	" 28		2, 295	10, 806
" 26	490	1, 832	27, 563	" 29		1, 750	9, 056
" 27		1, 006	26, 577	" 30		1, 743	7, 313
" 28	2, 219	1, 701	27, 075	" 31		1, 222	6, 091
" 29	1, 105	1, 875	26, 305	Nov. 1		684	5, 407
" 30	1, 840	2, 135	26, 010	" 4		682	4, 725
Sept. 3		3, 170	22, 840	" 7	1		4, 726
" 4	1, 106	2, 231	21, 715	" 15		2, 395	2, 331
" 5	265	1, 401	20, 579	" 18		306	2, 025
" 6		2, 269	18, 310	Dec. 3		310	1, 715
" 9	2, 613	2, 271	18, 652	" 6		14	1, 701
" 10	1, 702	2, 016	18, 338				
" 11	2, 486	1, 753	19, 071		111, 706	110, 005	

8. The material at plaintiff's disposal set out in the foregoing table, finding 7, consisted of unworked material furnished by the Government, of material in process, and of material in unacceptable garments, either in plaintiff's hands or not yet returned thereto.

Reporter's Statement of the Case

There was a large percentage of unacceptable garments proffered for delivery, which, upon inspection at the quartermaster's depot, was returned to the plaintiff. This the defendant counted as material under the performance bond included in the material for 31,960 coats. The more unacceptable coats manufactured and not corrected the less unworked material was available to the contractor for making other coats.

9. The record is silent as to the number of coats in plaintiff's hands from day to day that had been rejected by the defendant. Most of them were repaired or busheled by the plaintiff and again proffered for delivery. Of the garments proffered for delivery, the percentages of unacceptable garments were as follows at the close of the delivery dates:

1935	Proffered	Unacceptable	Percentage	1935	Proffered	Unacceptable	Percentage
July 12	1	0	----	Sept. 19	2,296	366	15.9
" 24	910	325	35.7	" 20	1,951	404	20.7
" 25	693	278	40.1	" 23	4,545	732	16.1
" 26	692	441	63.7	" 24	2,446	473	19.3
" 30	960	567	59.1	" 25	2,561	429	16.8
" 31	721	356	49.4	" 26	2,660	330	12.4
Aug. 1	1,024	439	42.9	" 27	1,881	233	12.4
" 2	960	442	46.0	" 30	2,495	316	12.7
" 5	1,113	529	47.5	Oct. 1	1,785	229	12.8
" 6	1,049	593	56.5	" 2	1,990	295	14.8
" 7	1,050	460	43.8	" 3	2,250	366	16.3
" 8	900	556	61.8	" 4	1,870	268	14.3
" 9	1,231	591	48.0	" 8	2,682	404	15.1
" 12	1,200	545	45.4	" 9	2,679	365	13.6
" 13	1,261	437	34.7	" 10	2,689	406	15.1
" 14	1,202	448	37.3	" 11	4,091	605	14.8
" 15	1,320	634	48.0	" 14	2,695	348	12.9
" 16	1,319	696	52.8	" 15	2,395	377	15.7
" 19	1,470	556	37.8	" 16	2,126	345	16.2
" 20	1,201	489	40.7	" 17	2,040	335	16.4
" 21	1,559	549	35.2	" 18	2,035	340	16.7
" 22	1,740	541	31.1	" 21	2,250	337	15.0
" 23	2,010	621	30.9	" 22	1,410	188	13.3
" 26	2,522	690	27.4	" 23	2,035	328	16.1
" 27	1,320	314	23.8	" 24	1,800	303	16.8
" 28	2,161	460	21.3	" 25	2,096	314	15.0
" 29	2,521	646	25.6	" 28	2,700	405	15.0
" 30	2,704	569	21.0	" 29	2,095	345	16.5
Sept. 3	4,066	896	22.0	" 30	2,100	357	17.0
" 4	2,704	473	17.5	" 31	1,440	218	15.1
" 5	1,771	370	20.9	Nov. 1	806	122	15.1
" 6	2,701	432	16.0	" 4	840	158	18.8
" 9	2,703	432	16.0	" 15	2,692	297	11.0
" 10	2,430	414	17.0	" 18	333	27	8.1
" 11	2,010	257	12.8	Dec. 3	326	16	4.9
" 12	2,068	396	19.1	" 6	16	2	12.5
" 13	1,710	325	19.0		140,136	30,131	----------
" 16	2,520	494	19.6				
" 17	1,498	180	12.0				
" 18	2,040	307	15.0				

10. Upon rejection of a coat by defendant's inspectors it was released to the plaintiff and, by the plaintiff, in most cases, altered or busheled in order to conform it to the defendant's requirements. It was then again proffered for delivery under the contract.

The high percentage of unacceptable coats made by the plaintiff so retarded plaintiff's operations as to put it substantially behind the agreed schedule of deliveries of the finished product to the defendant.

The coats were not immediately inspected for acceptance or rejection upon their receipt at the quartermaster's depot. The number of acceptable garments was unknown at such time and in order to determine the amount of unworked material due the contractor under its performance bond to replace immediately the material made up in the acceptable coats, the defendant, in the latter part of August, made an estimate of the number of acceptable coats then and there delivered, in lieu of immediate inspection, and issued new material accordingly. Theretofore issue of new material had awaited preliminary or final inspection, involving a wait of not exceeding 20 days.

Some shortage in delivery of material to plaintiff began about the middle of August 1935 prior to which time the minimum percentage of rejections at any one time had been 34.7% and the maximum 63.7%. The defendant's estimate of the unworked material due plaintiff was based on past performance. Beginning the fore part of September 1935 there was a decided improvement in the quality of plaintiff's proffered deliveries.

The record does not show the ratio between material in rejected garments returned from the quartermaster and material in plaintiff's plant in stock or in process.

There is no proof that the deficiency under material for 31,960 coats, beginning August 16, 1935, and ending October 9, 1935, as shown in finding 7, caused appreciable delay in performance, or that but for such lack the contractor would have finished on contract time. The plaintiff would have received more unworked material had it not had so many rejected garments on hand.

11. In payment for its services there was withheld from plaintiff by the defendant from time to time, as liquidated damages for delay in delivery, $6,223.32, and in addition $59.32 was collected from the plaintiff as such damages, totalling $6,282.64. These damages were calculated on the basis of credit for delivery for all acceptable garments as of the date of receipt thereof at the quartermaster's depot.

12. The plaintiff submitted a claim for refundment of liquidated damages, and on this claim the contracting officer made findings of fact June 3, 1936, wherein he determined that the contractor and not the Government was responsible for the delay for which liquidated damages had been assessed and concluded:

> That delays in production which resulted from contractor's inability to obtain material sufficient for peak production could only be attributed to the fact that the amount of bond the contractor elected to furnish did not cover the value of the materials necessary for such production, and therefore, such delays could not be construed as delays caused by an Act of the Government as contemplated by Article 15 of the contract.

The liquidated damages so withheld or collected have not been paid or refunded to the plaintiff.

13. The action taken by the contracting officer in the course of the contract work and at its conclusion, heretofore described, was not arbitrary, unreasonable, or grossly erroneous.

14. During the course of the contract work the plaintiff saved material that had been allowed it for manufacture, and at the conclusion returned this saved material to the defendant.

Certain other material furnished by the defendant was used by the plaintiff in excess of the agreed allowance, the cost whereof amounted to $518.25, after deducting another item not here involved. Demand on the plaintiff for the charge of $518.25 was made by the defendant on or about October 9, 1937, and it has not been satisfied.

The savings effected by the plaintiff exceeded in value the charge of $518.25.

Opinion of the Court

The court decided that the plaintiff was not entitled to recover. The court also decided that the defendant was not entitled to recover on its counterclaim.

LITTLETON, *Judge*, delivered the opinion of the court:

The only question in this case is whether the plaintiff or the defendant was, in view of the facts established by the record, responsible for the delay in the delivery of acceptable coats as required by the contract of June 17, 1935.

Plaintiff bases its whole case upon the allegation, which it contends is sustained by evidence of record, that the government by its failure to make prompt inspections of coats manufactured and tendered for inspection and acceptance delayed delivery within the meaning of the contract beyond the stipulated period for completion. We are of opinion that this contention cannot be sustained. Moreover, Art. 12 of the contract provided that the decision of the contracting officer on all questions of fact should be final and conclusive, and the contracting officer found, as set forth in finding 12, that plaintiff and not the government was responsible for the delay in completion of the contract and that any delay in production by plaintiff which may have resulted from plaintiff's inability to obtain a greater amount of material for peak production was attributable to the fact that the amount of bond which plaintiff elected to furnish under the contract and specifications was not sufficient to cover the value of the quantity of materials which plaintiff contends was necessary for such production. These findings of the contracting officer, from which no appeal was taken by plaintiff to the head of the department as required by Art. 15 of the contract, are not shown by the record to have been arbitrary, unreasonable, or grossly erroneous (finding 13). The record as a whole shows very clearly that the principal and primary cause of plaintiff's delay in manufacturing and delivering to the defendant acceptable garments was due, first, to the manufacture and tender by plaintiff of a large number of defective and unacceptable coats under the terms and conditions of the contract and, second, to its failure to furnish the defendant a bond in an amount sufficient to entitle it to receive at various times during the performance of

the contract a greater quantity of material which was to be furnished by the government. The contract and specifications did not provide the time within which the defendant should inspect the coats as tendered for acceptance, nor the method or manner in which such inspection should be made. The record, as a whole, fails to establish that the defendant at any time unreasonably delayed inspection of the articles tendered, or that the method of inspection adopted and followed by it in the circumstances was improper. For deliveries tendered between July 12 and August 15, 1935, the percentage of unacceptable coats ranged from 34.7 to 63.7 percent. The rejections on August 16 were 52.8 percent. The invitation for bids, the specifications, and the contract entered into provided that—

> Bidders are informed that the term "Delivery" is interpreted to mean the receipt, at destination depot, of acceptable articles.
>
> Bidders will state in the blank spaces provided therefor, the least number of calendar days (counting Sundays and holidays) from date of receipt of initial supply of Government materials, in which they will make and complete deliveries. In stating the time for deliveries, bidders should make allowances for both probable and unforeseen difficulties that may be encountered and they should make no promises they are not positive, beyond question, that they can fulfill, as they will be held strictly and absolutely to the schedule of deliveries offered by them.

Upon the basis of these provisions and conditions, plaintiff submitted its proposal and agreed with the defendant to manufacture and deliver 110,000 acceptable woolen coats in accordance with certain detailed specifications within 103 calendar days after the initial receipt of Government material. This the plaintiff failed to do. See Findings 4, 5, and 7.

In the letter of June 14, 1935, notifying plaintiff of the acceptance of its proposal and stating that the contract had been awarded to it, the defendant forwarded to plaintiff a performance bond on the regular departmental form in the amount of $23,450, covering 20 percent of the contract price as a guaranty of performance plus 50 percent of the total value of the material required for performance of the

contract, or an approximate total of $200,000. At plaintiff's request, and upon its responsibility, a bond in the total amount of $135,400 was accepted. The amount of the bond fixed the amount of material which the defendant was required to furnish from time to time. The contracting officer correctly interpreted the contract when he included in the amount of material which plaintiff was entitled to receive from time to time the quantity of material contained in unacceptable garments that had been proffered for "delivery" within the meaning of the contract.

In view of the evidence disclosed by the record and the findings of the contracting officer, the plaintiff is not entitled to recover. *Carroll Electric Company* v. *United States*, 76 C. Cls. 103, 124–125.

The defendant interposes a counterclaim for $518.25—see finding 14. The invitation for bids, the proposal submitted by plaintiff, and the specifications, which became a part of the contract between the parties, contained the following provision:

> EXCESS MATERIALS: Should the contractor require suiting in excess of the quantities provided by the allowances for the purpose of completing his contract, it will be furnished by the Government, f. o. b. Philadelphia Quartermaster Depot, * * *, and there will be deducted from any money due the contractor a sum equal to the number of additional yards of material furnished, multiplied by $5.25 per yard.

During the performance of the contract, plaintiff was furnished certain materials in excess of the authorized allowance required to manufacture the coats called for by the contract. The evidence shows that the value of this excess material furnished by the defendant was $518.25, for which the defendant demanded payment but which has not been paid. The position of plaintiff with reference to this item is that the defendant is not entitled to recover the same for the reason that the evidence shows that plaintiff effected savings in the total material furnished to it for the manufacture of the coats in question in excess, in value, of the charge of $518.25 which saved material, from the total gross amount furnished, was returned to and became the property of the defendant. In other words, upon the completion of the

contract the total amount of material actually used by plaintiff in the manufacture of the required number of acceptable coats was less than the agreed allowance. This fact is established by the record. The defendant is, therefore, not entitled to recover on its counterclaim.

The plaintiff's petition and the defendant's counterclaim are therefore dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

AMERICAN EMPLOYER'S INSURANCE COMPANY OF BOSTON, MASSACHUSETTS *v.* THE UNITED STATES

[No. 43921. Decided May 6, 1940]

On the Proofs

Government contract; surety on contractor's bond; liquidated damages.—Where plaintiff, as surety on the bond of a contractor who had entered into a contract with the Government for the erection of certain buildings and certain other work for a Veterans' Hospital, undertook to complete the work under the contract after the contractor had notified the Government that said contractor was unable to complete the work and said contract had thereupon been terminated by the contracting officer, and where plaintiff did complete the work, it is held that plaintiff is not entitled to have returned to it the amount withheld by the defendant as liquidated damages.

Same; application of liquidated damage clause to one or both units.—Where contract with the Government entered into on June 25, 1932, for the erection of certain buildings in connection with Veterans' Hospital contained a time limit provision which, as extended by the contracting officer, required that certain units should be completed by January 19, 1933, and that the entire contract should be completed by April 19, 1933, and where the first mentioned units were completed and accepted February 16, 1933, before the contractor stopped work on February 24, 1933, and the contract was terminated on March 7, 1933, it is held that the deduction by defendant of liquidated damages for 28 days delay from January 20, 1933, to February 16, 1933, in completing said units was in accordance with the provisions of the contract and was warranted. See *Wise* v. *United States,* 249 U. S. 361.

Same.—Where two or more buildings are to be erected under a contract providing for liquidated damages for delay, the liquidated-damage clause applies to either or both buildings in case of delay.

Same.—The liquidated damage clause in the instant case disappeared from the contract after the contract was terminated by the Government, not before.

Same.—In the instant case the assessment of liquidated damages for the failure to complete the first unit was within the terms of the contract and was due when plaintiff as surety undertook to complete the contract work.

The Reporter's statement of the case:

Mr. Frederic N. Towers for the plaintiff. *Messrs. Frank H. Myers* and *Norman B. Frost* were on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon a stipulation of facts between the parties:

1. On June 15, 1932, H. G. Christman Company entered into a written contract with the United States, represented by the contracting officer of the Veterans' Administration, whereby the former, in consideration of the payment to it of $661,500.00, agreed to furnish all labor and materials, and perform all work required for finishing complete, at the Veterans' Hospital, Des Moines, Iowa, the following:

Main building No. 1.
Dining hall and attendants' quarters building No. 2.
Administration building No. 3.
Recreation building No. 4.
Nurses' quarters building No. 5.
Residence building No. 6.
Officers' quarters building No. 7.
Officers' quarters building No. 8.
Laundry and shop building No. 9.
Storehouse and garage building No. 10.
Boiler house building No. 11, including radial brick chimney and steam tunnel, transformer and animal house building No. 13.
Covered walks, flagpole, roads, retaining walls, walks, grading and drainage in connection with the buildings but not including plumbing, heating, electrical work

> and outside distribution systems, electric elevators, refrigerating and ice-making plant and zeolite water-softening system.

The contract provided that the work would be performed in strict accordance with the specifications, schedules, and drawings, all of which were made a part of the contract.

A copy of the contract, designated VAc-214, is attached to the stipulation as Exhibit 1 and is made a part hereof by reference.

2. The plaintiff, as surety, and H. G. Christman Company, as principal, on June 25, 1932, executed a standard government form of performance bond whereby they bound themselves to the defendant in the penal sum of $331,000.00, conditioned upon the true performance and fulfillment of all the undertakings, covenants, terms, conditions and agreements of the contract between H. G. Christman Company and the defendant during its original term or any extensions that might be granted by the defendant, and also of any modifications of the contract that might be made, notice of extensions and modifications to the surety being expressly waived.

A copy of the bond is attached to the stipulation as Exhibit 2 and is made a part hereof by reference.

3. Article 1 of the contract provided that the work shall be commenced within 10 calendar days after the date of recepit of the notice to proceed and shall be completed within 250 days thereafter, except that the Storehouse and garage building No. 10, radial brick chimney, steam tunnel, and sufficient work in Boiler house building No. 11 to permit installation of boilers and equipment, will be completed 90 days prior thereto.

Article 9 of the contract, relating to delays and damages, as far as material hereto, provided:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as

> to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: * * *.

Article 37 of the specifications provided that the contractor will pay to the Government as liquidated and ascertained damages, and not as a penalty, the sum of $150.00 for each calendar day of delay in completion of the work beyond the date stated in the contract.

4. H. G. Christman Company received notice to proceed with the work on July 9, 1932. Receipt of this notice fixed March 16, 1933, as the completion date for buildings Nos. 1 to 9 inclusive, and December 16, 1932, as the completion date for the Storehouse and garage building No. 10, radial brick chimney, steam tunnel, and sufficient work in Boiler house building No. 11 to permit installation of boilers and equipment.

5. The Christman Company began work under the contract and during the months of August, November, and December 1932, and February 1933, it was delayed a total of 28 days because of unusually severe weather, and 6 days during November 1932 on account of a labor strike. Because of these delays, the contracting officer granted the Christman Company extensions of time of 34 days.

These time extensions extended the contract completion date for buildings Nos. 1 to 9, inclusive, to April 19, 1933, and extended the contract completion date for the Store-

house and garage building No. 10 and other work to January 19, 1933.

6. On February 24, 1933, the H. G. Christman Company stopped work for the reason that it was not able to meet its pay roll. By this date it had completed the Storehouse and garage building No. 10, the radial brick chimney, steam tunnel, and sufficient work in Boiler house building No. 11 to permit the installation of boilers and equipment, this work having been completed and accepted February 16, 1933.

7. On March 3, 1933, H. G. Christman Company, by letter, notified the plaintiff and defendant that it was unable to resume performance of the work.

Thereupon, the defendant's contracting officer on March 7, 1933, terminated the right of the Christman Company to proceed with the work in accordance with Article 9 of the contract by written notice to the Christman Company and the plaintiff.

8. The plaintiff, on March 10, 1933, made an offer as surety under the bond to complete the work within the terms and provisions of the original contract and all modifications thereof, provided all amounts due and to become due under said contract and all modifications thereof would be made to it. The defendant accepted plaintiff's offer on March 14, 1933.

9. The plaintiff started completion of the contract work on April 13, 1933, and finished it on June 22, 1933.

The contracting officer, on February 28, 1933, issued a written change order providing for the installation of a tile floor in the kitchen of building No. 5. The plaintiff was granted additional time of six calendar days by the contracting officer on account of this change in the work.

The contracting officer found as a fact that there was an excusable delay of 47 calendar days from and including February 25, 1933, to and including April 12, 1933, caused by the closing of the Citizens National Bank of South Bend, Indiana, which impounded funds intended to be used in connection with the work. The contracting officer also found that this delay was due to unforeseeable causes beyond the control and without fault or negligence of the plaintiff.

The acts of the contracting officer, stated above, extended the contract completion date for buildings No. 1 to 9, inclusive, to June 11, 1933.

10. When the work was abandoned by the H. G. Christman Company there was due it $38,880.00, representing the monthly estimate for work performed during February 1933. The defendant also had in its possession $54,440.40 representing ten percent of the amount of the partial payments previously paid to the Christman Company. The defendant had retained this latter sum in accordance with Article 16 (b) of the contract.

Upon completion of the work, the plaintiff was paid the balance due under the contract by the defendant, except that liquidated damages in the amount of $8,700.00 were deducted for 58 days delay in the completion of the work.

11. After the Court of Claims rendered its decision in the case of *The Fidelity & Casualty Company of New York* v. *The United States*, 81 C. Cls. 495, the defendant on December 28, 1936, paid plaintiff the sum of $4,500.00, representing liquidated damages for the delay in completion of the contract work which had occurred after the right of the contractor to proceed with the work had been terminated.

The defendant still has $4,200.00 deducted from the contract price as liquidated damages for 28 days delay from January 20, 1933, to February 16, 1933, both dates inclusive, in completing the Storehouse and garage building No. 10, radial brick chimney, steam tunnel and sufficient work in Boiler house building No. 11 to permit the installation of boilers and equipment.

12. The defendant was not responsible for any of the delay in the prosecution of the work.

The contracting officer acted correctly in granting extensions of time under the provisions of the contract and there is no proof that he acted under a mistake of fact or in bad faith in terminating the right of the original contractor to proceed with the work.

Because the work was completed by the plaintiff, the defendant sustained excess costs and actual damages amount-

ing to $1,200.71, in the completion of the work over what it would have cost had the work been completed by the original contractor.

The court decided that the plaintiff was not entitled to recover and that the defendant was entitled to recover $1,200.71 on its counterclaim.

WHALEY, *Chief Justice*, delivered the opinion of the Court:

Plaintiff was the surety on the bond of H. G. Christman Company which entered into a contract with the defendant for the erection of buildings and certain other work for the Veterans' Administration Hospital at Des Moines, Iowa, in accordance with the specifications, schedules, and drawings, made a part of the contract, in consideration of the sum of $661,500.

The contractor agreed to commence work 10 calendar days after the date of receipt of notice to proceed and to complete the contract within 250 calendar days after receipt of notice *except* that the Storehouse and garage building No. 10, radial brick chimney, steam tunnel, and sufficient work on Boiler house building No. 11 to permit installation of boilers and equipment, would be completed *90 days prior* to the completion date of the entire contract.

The contractor was notified to proceed with the work on July 9, 1932, and the receipt of this notice fixed December 16, 1932, as the completion date for Storehouse and garage building No. 10, radial brick chimney, steam tunnel, and sufficient work on Boiler house building No. 11 to permit installation of boilers and equipment, and March 16, 1933, as the completion date for buildings No. 1 to 9, inclusive.

There were certain delays during the months of August, November, December 1932, and February 1933, and an extension of time amounting to 34 days was allowed by the contracting officer for these delays. With these extensions the completion date for the Storehouse and garage building No. 10 and other work was fixed at January 19, 1933, and the contractor was allowed until April 19, 1933, to complete Buildings No. 1 to 9, inclusive.

The contractor finished the work on the Storehouse and garage building No. 10, radial brick chimney, steam tunnel, and sufficient work on Boiler house building No. 11 to permit installation of boilers and equipment, on February 16, 1933, which was 28 days after the completion date as extended.

On February 24, 1933, the contractor stopped work, and on March 3, 1933, notified the Government that it was unable to resume the performance of the contract work. On March 7, 1933, the contracting officer terminated the contract.

On March 10, 1933, plaintiff made an offer, as surety under the bond, to complete the work within the terms and provisions of the original contract and all modifications thereof, provided that amounts due and to become due under said contract and modifications thereof would be paid to it. The defendant accepted this offer on March 14, 1933.

When the work was discontinued by the Christman Company, there were certain amounts due it, representing monthly estimates of work performed and also retained percentages and there were due by the contractor liquidated damages of $4,200, being $150 a day for 28 days for its failure to complete this part of the work on time.

Plaintiff completed the unfinished portions of the contract work which it had taken over and liquidated damages of $8,700 were assessed against it because of the failure to complete within the contract time. Defendant, on the work completed by the surety, sustained excess costs and actual damages amounting to $1,200.71. The defendant, in final settlement with the plaintiff, has retained $4,200 as liquidated damages due by the Christman Company for 28 days' delay in completion of that part of the work which was to be completed by January 19, 1933, but has returned to plaintiff the $4,500 assessed as liquidated damages for the delay in final completion.

Plaintiff admits that the Government's counterclaim for $1,200.71 represents the excess cost which the Government has sustained by reason of its failure to complete the work which it undertook within the time limit. It contends, however, that the liquidated-damage clause applies to the entire

contract and not to the separate portions of it; that the amount of $4,200, which was assessed against the account of the Christman Company, its principal, is unwarranted, for the reason that when the contract was cancelled by the Government under Article 9 the liquidated-damage clause disappeared from the contract; and that the contract was not subject to division but must be treated as a whole.

Plaintiff knew when the bond was issued of the completion dates of the respective portions of the contract and that certain buildings were to be completed at an earlier date than the completion date of the entire contract. The failure to complete the first part may have caused the Government more expense and inconvenience than delay in completion of the second part. When plaintiff assumed completion of the contract after its cancellation, and agreed to complete the contract according to its terms and conditions, it was aware that liquidated damages for delay were due by its principal. It undertook to perform the work with this knowledge.

A somewhat similar case is *Wise* v. *The United States*, 249 U. S. 361, 367, where there were two buildings to be erected for the Agriculture Department and a liquidated-damage clause was inserted at a certain sum per day for each day's delay. It was held that the liquidated-damage clause applied to either or both buildings in case of delay. The Supreme Court said:

> There is nothing in the contract or in the record to indicate that the parties did not take into consideration, when estimating the amount of damage which would be caused by delay, the prospect of one building being delayed and the other not, and the amount of the damages stipulated, having regard to the circumstances of the case, may well have been adopted with reference to the probability of such a result.

In the case now before us the assessment of liquidated damages for the failure to complete the first unit was within the terms of the contract and was due when plaintiff undertook to complete the contract work.

The liquidated-damage clause disappeared from the contract after the contract was cancelled by the Government,

Syllabus

not before. The plaintiff did not pay any damages for delay in that part of the project it took over. *Fidelity & Casualty Company* v. *United States*, 81 C. Cls. 495.

But plaintiff was liable under Article 9 of the contract for any excess cost and therefore the amount of excess cost to which the Government was put is recoverable. The defendant has set up a counterclaim for this amount which plaintiff admits is correct.

The plaintiff is not entitled to recover.

The defendant is entitled to recover the sum of $1,200.71.

Judgment will be entered for the defendant in the sum of $1,200.71. It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

ARTHUR B. GRIFFITH AND RICHARD I. GRIFFITH, EXECUTORS, UNDER WILL OF HORACE S. GRIFFITH, DECEASED, v. THE UNITED STATES

[No. 44078. Decided May 6, 1940]

On the Proofs

Estate tax; transfers in contemplation of death.—Where decedent in 1928 and 1929, six and five years, respectively, before his death in 1934, transferred certain property, including securities and cash, to designated trustees, under four trust identures providing in the one case of two of the trusts that the income therefrom should be paid, first, to decedent's wife during her lifetime, and upon her death, if he should survive her, to decedent during his lifetime, and then if both decedent and wife should predecease their invalid daughter said trust income should be expended for the support and maintenance of said invalid daughter; and in the case of the other two trusts providing that the income therefrom should be paid to the decedent during his lifetime, and then to his wife if he should predecease her, and upon the death of both him and his wife to his other children named, with certain provisions in each of said four trust identures for the disposition of the corpus of said trusts at certain times and in certain contingencies, it is held that said transfers did not constitute a testamentary disposition of property made in contemplation of death within the meaning of the applicable provisions of the revenue statutes.

Same.—"In contemplation of death," within the statute taxing transfers "in contemplation of death," means that thought of death is the impelling cause of transfer, and if the dominant motive is one associated with life rather than with death, the transfer is not taxable under such statute.

Same.—Where the record discloses that paramount to all other considerations in decedent's mind was the particular concern which he felt for his invalid daughter, in creating the one trust, and assurance of an adequate income for himself in later years, in creating the second trust, it is held that plaintiff is entitled to recover for estate taxes assessed against the transfers in trust as made "in contemplation of death."

The Reporter's statement of the case:

Mr. J. H. Ward Hinkson for plaintiffs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiffs sue to recover $11,818.31, with interest, alleged overpayment of estate tax by reason of the inclusion by the defendant in the decedent's gross estate of the value of certain property transferred by the decedent in 1928 and 1929, five and six years, respectively, before his death on August 10, 1934; such property was included in the gross estate on the ground that transfers had been made in contemplation of death.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Horace S. Griffith (hereinafter sometimes referred to as the "decedent"), a resident of Delaware County, Pa., died August 10, 1934, at the age of 79. The decedent left a will dated May 28, 1931, under which he appointed plaintiffs as executors.

2. June 25, 1935, plaintiffs filed an estate-tax return disclosing a gross estate of $58,623.12, a net estate of $4,497.32, and an estate-tax liability of $44.97, which was paid on the same day.

3. March 24, 1936, the Commissioner of Internal Revenue mailed to plaintiffs a notice of a proposed deficiency assess-

ment of estate tax in the amount of $14,024.44 arising by reason of the inclusion in the decedent's gross estate of certain transfers made by him in his lifetime. As a basis of such inclusion the Commissioner stated that the transfers under four trusts hereinafter referred to had been "made to take effect in possession and enjoyment at or after death" and were accordingly includable in the decedent's gross estate. On April 24, 1936, the Commissioner advised plaintiffs that the foregoing determination had become final, subject to an allowance of credit for state estate, inheritance, legacy, or succession taxes, and that payment of that deficiency should be made upon receipt of notice and demand from the collector.

4. July 2, 1936, the plaintiffs paid the sum of $12,330.56 on account of the deficiency referred to in the previous finding plus interest in the amount of $570.03. The balance of the assessment was eliminated by credit for state inheritance taxes paid.

Of the deficiency so paid $11,818.31 resulted from the inclusion by the Commissioner in the decedent's gross estate of the value at decedent's death of two trusts which had been established by the decedent by indentures dated April 20, 1928, and of the value of two trusts which had been established by indentures dated June 20, 1929. In other words, the exclusion of the value of those four trusts from decedent's gross estate would now result in an overassessment of estate taxes in the amount of $11,818.31. The exclusion from the gross estate of the decedent of the value at the date of his death of the two trusts established by the trust indentures dated April 20, 1928, would result in an overassessment of estate tax in the amount of $3,664.28.

5. April 7, 1938, plaintiffs filed a claim for refund of estate tax amounting to $11,764.95 with interest from date of payment. June 21, 1938, the Commissioner rejected the claim for refund in its entirety on the ground that the transfers under the four trusts which were included in the gross estate and which gave rise to the greater part of the additional assessment referred to above "were properly included in the decedent's gross estate as a testamentary disposition of property and therefore made in contemplation

of death, and taxable under the provisions of section 302 (c) of the revenue act of 1926 as amended."

6. Two of the four trusts involved in the Commissioner's determination and also in plaintiffs' claim for refund were established by the decedent April 20, 1928, and the other two June 20, 1929. Except for a small difference in amount and in the securities transferred, the two trusts set up April 20, 1928, differed from each other only in that in one trust The First National Bank of Media, Pa., was named as one of the two trustees, whereas in the other trust, in place of that trustee, The Media Title and Trust Company of Media, Pa., was named. The other two trusts differed from each other in a similar manner. Arthur B. Griffith, one of the decedent's sons, was the other trustee named in each of the four trusts.

The reason for establishing two of the trusts with one bank as a trustee and two with another bank as a trustee was because of prudence on the part of the decedent, with the thought that in the event of the failure of one bank there might still remain the property in the other trusts at the other bank.

7. The trust instruments established April 20, 1928, after setting out the securities which were transferred by the decedent to the trustees, stated that the securities were—

> * * * to be held by them in trust and the net annual income thereof to be paid over unto my wife, Mary F. Griffith, for and during the term of her natural life. After her decease, if I should survive her, then to pay the net annual income thereof over unto me, the said Horace S. Griffith, for and during the term of my natural life. At my death, if my wife should have been deceased before me, then to pay the net annual income thereof toward the support and maintenance of my daughter, Mary F. Griffith, Jr., for and during the term of her natural life, without any power of anticipation or control on her part and the said income shall not be subject to any attachment or suit or engagement of any kind during her lifetime. If, in the discretion of my Trustees, it should be necessary to expend for the use and benefit of my said daughter, Mary F. Griffith, Jr., sums beyond the amount of this income, then I do authorize and empower them, in their discretion, to expend from the principal thereof

sum or sums not exceeding Five Hundred Dollars in any one calendar year. I do further authorize and empower Arthur B. Griffith, one of my said Trustees, who is associated with The First National Bank of Media, Pennsylvania, as cotrustee, to nominate for himself a successor in office as such, by his last will and testament and if, at any time, he, the said Arthur B. Griffith, should not be satisfied with the management and control of my estate, himself being associated with The First National Bank of Media, Pennsylvania, he shall have the power to nominate and designate a successor to the said The First National Bank of Media, Pennsylvania, in the form of some other company incorporated for that purpose by the laws of the State of Pennsylvania.

If, at the death of my said daughter, Mary F. Griffith, Jr., she should leave surviving her lawful child, children and grandchildren, then my said Trustee shall reduce the said trust fund, or any remaining portion thereof, to cash and pay to the said child, children or grandchildren of my said daughter, Mary F. Griffith, Jr., 33⅓% of the said fund and the other 66⅔% to be paid over to such persons living at that time who would have been my heirs at law as of that date. If the said Mary F. Griffith, Jr., should die without leaving to survive her lawful child, children and grandchildren, then my said Trustee shall reduce the said trust fund, or any remaining portion thereof, to cash and pay the same over to such persons living at that time who would have been my heirs at law as of that date.

8. The situation which gave rise to the creation of the two trusts mentioned in the preceding finding was that at that time the decedent had an invalid daughter, then forty-five years of age, who was suffering from an incurable cancer, and the decedent was desirous that provision be made for her support and maintenance. Through the trusts an independent income was provided for the decedent's wife during the wife's lifetime and, in the event the wife predeceased the decedent, the income from the trusts would be payable to the decedent for his life. In the event both the decedent and his wife should predecease the daughter, the income was to be paid toward the support and maintenance of the daughter during the term of her natural life. As shown from the instrument set out above, provision was also made

for other contingencies, including the distribution of the corpus of the trusts after the death of the decedent and his wife and daughter.

The invalid daughter died October 11, 1929, and decedent's wife died January 30, 1930.

The trusts were carried out by the respective trustees in accordance with their provisions, and upon the death of the decedent on August 10, 1934, the corpus of the trusts was distributed to the decedent's six surviving children. The total value of the property in the two trusts at decedent's death was $35,264.90.

9. One of the trusts created June 20, 1929, read as follows:

> THIS AGREEMENT made the twentieth day of June 1929, by and between HORACE S. GRIFFITH, of the Township of Aston, County of Delaware, and State of Pennsylvania, party of the first part (hereinafter called the Grantor) and THE FIRST NATIONAL BANK OF MEDIA and ARTHUR B. GRIFFITH, parties of the second part (hereinafter called the Trustees) WITNESSETH:
>
> That the party of the first part has deposited with the parties of the second part certain securities, a list whereof is hereby attached and made a part hereof, and also the sum of ONE THOUSAND DOLLARS IN CASH, IN TRUST to keep the same well invested in the same securities in which they are received, or any securities which may be issued by one or more of the companies issuing the same or a consolidation, merger, or successor of any such company, in exchange or substitution for such security, without any liability on the part of said Trustees for any loss or depreciation of value, or, in their discretion, to sell all or any part of said investments, provided that, in case of such sale, the proceeds thereof shall be invested and reinvested only in the class of securities known as legal investments for trust funds in Pennsylvania, and to pay the net income thereof, on the last day of each month, unto the said HORACE S. GRIFFITH, for the term of his life, and, upon the decease of the said HORACE S. GRIFFITH, to pay the said net income unto his wife, MARY F. GRIFFITH, for the term of her life; and, upon the decease of the said MARY F. GRIFFITH, to divide and pay the said net income in equal portions unto his children, HORACE B. GRIFFITH, WILLIAM E. GRIFFITH, RICHARD I. GRIFFITH, HERBERT H. GRIFFITH, ARTHUR B. GRIFFITH, and RACHEL GRIFFITH SMITH.

Reporter's Statement of the Case

Provided, however, that if any of said children shall be or become deceased, leaving wife or husband, the income of such deceased child's share shall be paid to such wife or husband for their life.

Provided, also, that no part of said trust fund, nor the interest or income arising therefrom, shall or may, at any time hereafter, be liable or subject in any manner whatever to the control, engagements, debts, or liabilities of any of the aforesaid beneficiaries, nor shall any part of said principal or income be subject to any assignment, alienation, anticipation, levy, execution, or attachment whatsoever.

Provided further, that, upon the death of any of said children who have issue, they shall have the power to bequeath their share of said principal to any of their own children, in such proportion and manner as they see fit, by any last will and testament, which they may execute, but in the case of my daughter, RACHEL GRIFFITH SMITH, who has no issue, her share of the principal shall be paid over to any issue she may have who live to attain the age of twenty-one years, and if she shall not have issue to survive her or if such issue shall not live to attain the age of twenty-one years, then such share of the principal shall be divided equally among the other beneficiaries of the principal of the trust. In case any of said children should die without leaving a last will and testament, but leaving issue, their share shall be divided and paid over in equal shares unto such issue.

Provided, however, if any of said children shall die without leaving issue (or in case of the said RACHEL GRIFFITH SMITH leaving issue who shall not attain the age of twenty-one years) then such share of principal, after the death of the surviving wife or husband, if any, shall remain a part of the said trust fund for the benefit of the surviving beneficiaries of said fund.

If at any time the said ARTHUR B. GRIFFITH shall not be satisfied with THE FIRST NATIONAL BANK OF MEDIA as Co-Trustee, he shall have the power to designate any other Trust Company or banking corporation authorized to do a trust business in Delaware County or Philadelphia as Co-Trustee in place and stead of THE FIRST NATIONAL BANK OF MEDIA, and he shall also have the privilege of designating his own successor as Co-Trustee by last will and testament or otherwise.

The other trust established on the same date differed from the one just referred to only in the manner referred to in finding 6.

10. At the time the two trusts were set up on June 20, 1929, the decedent had seen the rise and fall of the Florida boom and had no confidence in the speculative boom in securities which was then at its height. In order to avoid the temptation of speculative risks in unsound investments or in his hazardous textile business, to assure an income to himself for life and also to leave a part of his estate intact for the benefit of his heirs, the decedent created the two trusts on June 20, 1929.

These two trusts have been administered by the trustees in accordance with their terms. The total value of the property in the two trusts at the time of decedent's death was $93,752.33.

11. At the time the four trusts referred to above were created the decedent was in excellent physical and mental health. Until a few days before his death which resulted from coronary thrombosis, he had never been seriously ill in his life and he remained actively engaged in his business until a few days before his death. These four trusts and the transfers therein involved were not made by the decedent in contemplation of death.

The court decided that the plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The Commissioner of Internal Revenue in an audit of the estate tax return first determined and held that the property involved in the transfers by the decedent, as disclosed and described in the findings, had been made to take effect in possession and enjoyment at or after death, but later, after the decision in *Hassett* v. *Welch*, 303 U. S. 303, in which it was held that the Joint Resolution of Congress of March 3, 1931, and section 803 (a) of the Revenue Act of 1932 could not be applied retroactively, the Commissioner rejected plaintiffs' claim for refund on the ground that the transfers constituted a testamentary disposition of property made in contemplation of death. We are of opinion from the facts established by the record, which so far as necessary to a proper determination of the question presented have been set forth in the findings and need not be repeated

here, that the property transferred by the decedent on April 20, 1928, and June 20, 1929, were not transfers made in contemplation of death within the meaning of the applicable provisions of the revenue statute, and that plaintiffs are therefore entitled to recover the tax collected by reason of the inclusion of the value of such property in the gross estate. See findings 8, 10, and 11.

Counsel for defendant endeavor to sustain the action of the Commissioner in including the property in question in the gross estate on the ground that the transfers were testamentary in character and that, for that reason, the decedent must have made them in contemplation of death. In view of the facts disclosed by the record, this contention cannot be sustained. In *United States* v. *Wells*, 283 U. S. 102, the court discussed at length the meaning of the term "in contemplation of death" and pointed out that the facts in each case must be carefully scrutinized to determine the dominant motive of the donor and that if the dominant motive is one that is associated with life, rather than with death, section 302 (c) should not be held to be applicable. In this connection the court said: "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, * * *. If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive." And, further, the court said: "* * * age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer."

The record in the case at bar discloses that paramount to all other considerations in the decedent's mind was the particular concern which he felt for his invalid daughter so far as the 1928 transfers are concerned; and the assurance of an adequate income for himself in later years so far as the 1929 transfers are concerned. These were the dominant motives which impelled the decedent to act, and any other considerations that might have occurred to him were purely incidental. Only by an inference altogether unwarranted under all the evidence of record could it be said that the decedent intended to effect a testamentary disposition, and

to us it is clear from a consideration of all the evidence submitted that it cannot be said that the decedent in making transfers did so in contemplation of death. *Harris Trust & Savings Bank et al.* v. *United States*, 90 C. Cls. 17, 29 Fed. Supp. 876.

Judgment will be entered in favor of plaintiffs for $11,818.31 with interest as provided by law. It is so ordered.

WHITAKER, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WATERMAN STEAMSHIP CORPORATION *v.* THE UNITED STATES

[No. 44090. Decided May 6, 1940]

On the Proofs

Income and excess-profits tax; change of accounting period; computation on annual basis.—Where in 1933 the taxpayer, with the permission of the Commissioner of Internal Revenue, changed its accounting period from a calendar year basis to a fiscal year basis ending September 30, and where the first income tax return under the new arrangement covered the nine months' period ending September 30, 1933, it is held that the action of the Commissioner was correct in computing and assessing taxpayer's income and excess profits tax for the nine months' period on an annual basis, under the provisions of section 216 (b) of the National Industrial Recovery Act which provided that the tax imposed by said section "shall be assessed, collected and paid in the same manner and shall be subject to the same provisions of law * * * as the taxes imposed by Title I of the Revenue Act of 1932."

Same.—Where the Revenue Act of 1932 provides that if a separate return is made on account of a change in the accounting period, "the net income, computed on the basis of the period for which separate return is made, shall be placed on an annual basis" and said Act sets forth the method by which such calculation shall be made, and where the Commissioner followed said method in computing and assessing the excess profits tax of taxpayer due under the provisions of section 216 of the National Industrial Recovery Act, it is held that said action of the Commissioner was correct.

Same; taxable year.—The term "taxable year" has different significances, according to its use, and in internal revenue statutes ordinarily means the period for which the taxes are assessed.

Reporter's Statement of the Case

Same; intention of Congress.—In the National Industrial Recovery Act it was the intention of Congress that the excess-profits tax should be computed upon the amount of profits which exceeded 12½ per cent annually of the adjusted declared value of the capital stock of taxpayer.

The Reporter's statement of the case:

Mr. Geo. E. H. Goodner for the plaintiff. *Messrs. D. F. Prince* and *Scott P. Crampton* were on the brief.

Mr. Geo. H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows upon the stipulation of the parties:

1. The Waterman Steamship Corporation is a corporation organized under the laws of the State of Alabama and is engaged in the steamship business, with principal office at Mobile, Alabama.

2. Under the provisions of the National Industrial Recovery Act, plaintiff filed a capital-stock tax return for the year ending June 30, 1933, and therein declared a value of $1,600,000.00 for its capital stock as of December 31, 1932.

3. On June 7, 1933, pursuant to request of plaintiff, the Commissioner of Internal Revenue granted permission to the plaintiff to change its basis of computing its income from a calendar year to a fiscal year ending September 30, effective September 30, 1933.

4. Plaintiff filed an income and excess-profits tax return with the Collector for the District of Alabama for the period January 1 to September 30, 1933, disclosing therein a net income for such period of $193,037.46; an income-tax liability thereon of $26,542.65, which was paid; and no excess-profits tax liability.

5. Upon auditing the return, the Commissioner of Internal Revenue determined the net income for this period to be $207,823.14 (which determination is not contested by plaintiff); the income-tax liability thereon to be $28,575.68; and the excess-profits tax liability to be $2,891.16. He thereupon assessed a deficiency in income tax of $2,033.03 and a

deficiency in excess-profits tax of $2,891.16, which amounts plaintiff paid on August 27, 1935, together with interest thereon of $207.31 and $294.82, respectively. No part of the amounts so paid has been refunded to plaintiff.

6. The Commissioner of Internal Revenue arrived at said deficiency in excess-profits tax in the following manner:

Net income for taxable period January 1 to September 30, 1933, as determined by him	$207,823.14
Net income raised to annual basis (12/9 of above)	277,097.52
Less: 12½% of $1,600,000.00, the value of plaintiff's capital stock as declared in its capital-stock tax return for the year ending June 30, 1933	200,000.00
Amount subject to excess-profits tax	77,097.52
Excess-profits tax at 5%	3,854.88
9/12 of tax on annual basis	2,891.16

7. On August 21, 1937, plaintiff filed a claim for refund of the excess-profits tax paid by it in the amount of $2,891.16 and the interest thereon in the amount of $294.82. The grounds of the claim were that the tax was levied under an unconstitutional act and that the Commissioner computed the excess-profits tax as shown in the preceding finding on the theory that the income for a fractional part of a year should be placed on an annual basis and thus arrived at $2,891.16 as the correct excess-profits tax, whereas the plaintiff alleged that there was no provision in the law for computing the income for the nine months' period on an annual basis and that the correct computation of the excess-profits tax on the income determined by the Commissioner is as follows:

Net income	$207,823.14
Less: 12½% of $1,600,000, the declared value of taxpayer's capital stock in the capital-stock tax return for the year ending June 30, 1933	200,000.00
Balance taxable at 5%	7,823.14
Excess-profits tax at 5%	391.16
Tax assessed and paid	2,891.16
Overpayment of tax	2,500.00
Overpayment of interest, 2500/2891.16 of $294.82	254.93
Total overpayment of tax and interest	2,754.93

and plaintiff therefore demanded a refund of $2,754.93, with interest as provided by law by reason of the erroneous computation of the excess-profits tax. This claim was rejected in full on June 13, 1938.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

In 1933 the plaintiff, Waterman Steamship Corporation, with the permission of the Commissioner of Internal Revenue changed its accounting period from a calendar year basis to a fiscal year basis ending September 30, and the first income tax return under the new arrangement covered the nine months' period ending September 30, 1933. The parties agree that plaintiff's income for this period was $207,823.14, and $2,891.16 tax and $294.82 interest thereon were assessed and paid by the plaintiff. The plaintiff duly filed a claim for refund of the amount so paid claiming that in fact no tax was due for this period, and the question in the case is whether it was rightly assessed by the Commissioner. The basis of plaintiff's claim is that the Commissioner computed the tax on an annual basis, that is, he took the income for the nine months' period and ascertained what it would be at the same rate for a year. From this amount he deducted 12½ percent of the declared value of plaintiff's capital stock to find the taxable income. Computing 5 percent of that amount as the tax thereon for a year, he fixed the excess-profits tax for the taxable year at 9/12ths of this amount, or $2,891.16, which, as we have said above, was paid by the plaintiff. See Finding 6 for a detailed statement of the computation.

Plaintiff contends that the Commissioner should have deducted 12½ percent of the declared value of the stock from the amount of net income for the taxable year (nine months) which would give, as plaintiff claims, the correct amount of taxable income at $7,823.14 and that the excess-profits tax on that amount would be only $391.16.

The argument of plaintiff is to the effect that there is no authority in the law for computing plaintiff's 1933 excess-

profits tax on an annual basis. Counsel for plaintiff insist that the Commissioner of Internal Revenue cannot legislate or read provisions into the law which are not found there but must administer the law as he finds it. This will be conceded. However, the Commissioner claims that the law makes a special provision for the calculation of the tax when it is being computed for a period of less than a year.

The excess-profits tax in this case was collected under Section 216 of the National Industrial Recovery Act, 48 Stat. 195, 208, which provides as follows:

> (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock * * * as of the close of the preceding income-tax taxable year * * * determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.
>
> (b) The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law (including penalties), as the taxes imposed by title I of the Revenue Act of 1932.

We think Congress intended to compute the excess-profits tax upon the amount of profits which exceeded 12½ per cent *annually* on the adjusted declared value. If the tax were not imposed on an annual basis, there would in effect be one rate for a short term and a higher rate for a full year. In a case like the one before us where it is necessary to compute the tax for only part of a year, it is evident that a gross injustice would be done between taxpayers. If plaintiff's theory is correct, it would give a great advantage to the corporation which was making a return for only part of a year. A concern which was making a return for six months and made a profit of 12½ per cent would pay no tax although it was making profit at the rate of 25 percent on an annual basis, and another concern which was reporting for a full year and made 25 percent would be obliged

to pay a very heavy tax. Nevertheless, if there is no provision whatever in the law for computing the tax on an annual basis, the fact that an oversight occurred and an injustice was committed will not permit engrafting upon the law a provision to correct it.

Counsel for plaintiff call attention to the provisions of Section 216 imposing the excess-profits tax upon such portion of the net income for the "income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock." The term "taxable year" has different significations, according to its use. Ordinarily it means the period for which the taxes are assessed and if this part of the National Industrial Recovery Act is to be followed literally, the action of the Commissioner could not be sustained. At this point it becomes necessary to determine whether the provisions of Section 216 of the National Industrial Recovery Act are modified by the provisions of the act of 1932 and this necessitates an examination of the provisions of the two statutes.

It will be observed that Section 216 of the National Industrial Recovery Act above set out contains in subdivision (a) a provision as follows:

> The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

and in (b)

> The tax imposed by this section shall be assessed, collected, and paid in the same manner, and shall be subject to the same provisions of law * * * as the taxes imposed by title I of the Revenue Act of 1932.

Section 47 (c) of the Revenue Act of 1932 contained a special provision applicable to the facts in this case as follows:

> (c) *Income placed on annual basis.*—If a separate return is made under subsection (a) on account of a change in the accounting period, the net income, computed on the basis of the period for which separate return is made, shall be placed on an annual basis by multiplying the amount thereof by twelve and dividing by the number of months included in the period for

which the separate return is made. The tax shall be such part of the tax computed on such annual basis as the number of months in such period is of twelve months. (47 Stat. 169, 187.)

A reading of these provisions we think shows plainly that Congress intended the provisions of the act of 1932 to apply to taxes imposed under Section 216 of the National Industrial Recovery Act. It is asserted on behalf of plaintiff that the word "terms," as used in subdivision (a) of Section 216 of the above-named act, is limited in its meaning and signification so as not to be applicable to the computation of the excess-profits tax imposed by that section. But this assertion is not supported by any sound reasons. If we turn to the dictionary for a definition of the word "term" or "terms," we find that one of the meanings of "terms" is "provisions" when used with reference to the statements contained in a written or printed document, which would include a statute. In our opinion, the language of Section 216 (a) with reference to its terms was used expressly for the purpose of making the provisions of the Revenue Act of 1932 applicable. Besides this, it will be noted that subdivision (b) of Section 216 provides that the tax shall be assessed in the same manner and subject to the same provisions of law as the taxes imposed by title I of the Revenue Act of 1932. The assessment would include the computation of the tax, and to make the matter doubly certain the statute says that the tax shall be subject to the same provisions of law as those imposed by title I of the Revenue Act of 1932. It would seem that Congress made a special effort to make it plain that the tax in question was to be controlled by the Revenue Act of 1932.

If, as we have held above, Section 47 (c) of the Revenue Act of 1932 requires the income to be placed on an annual basis where a separate return is made on account of a change in the accounting period (as occurred in the case before us), then it necessarily follows that the action of the Commissioner in the instant case was correct as he strictly followed the requirements of the 1932 act by multiplying the amount of the net income by 12 and dividing by the number of months included in the period for which a separate

return was made. The tax was then computed as provided by the 1932 act on such an annual basis as the number of months in such period was part of twelve months.

When enacting the National Industrial Recovery Act and the provisions therein for an excess-profits tax, Congress and its legislative counsel must have been aware of the necessity of making some provision for the computation of the tax in case the period for which it was imposed was less than a year, and we think the special provisions to which we have called attention were intended to supply what otherwise would be a marked defect in the law. Counsel for plaintiff call attention to the 1934 Revenue Act which included in the portion thereof providing for an excess-profits tax a special provision for the computation of the tax for part of a year, and argue that this shows it was understood that the National Industrial Recovery Act, under which we are now proceeding, had failed to make any provision for part of a year. We think this does not follow. Congress was then framing a general law covering income taxes, excess-profits taxes, estate taxes, excise taxes, and others. It was necessarily written differently from a special law passed for a special purpose such as the National Industrial Recovery Act.

Counsel for plaintiff cite in support of their contention the case of *Strong et al.* v. *United States*, 62 C. Cls. 67. We think the decision in this case has no application as it was made under an altogether different law and under different circumstances. The tax in that case was levied for a fiscal period beginning September 1, 1917, and ending February 28, 1918, under the old war excess-profits tax then in force but since repealed. The provisions of this act were quite different from what we have now under consideration. Moreover, the case involved a partnership and the act then prevailing included special provisions as to how the tax should be computed in partnership cases. There was nothing in the act to support the action taken by the Commissioner in the case cited, and Section 47 (c) of the Revenue Act of 1932 was not then in existence.

There is also an allegation in the petition that the act imposing the tax in question is unconstitutional and void.

But this matter is not argued, presumably because this court in a recent case has decided otherwise.

Our conclusion is that the plaintiff's petition must be dismissed and it is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

DAVID POLLOCK, ABRAM POLLOCK, SIDNEY POLLOCK, WILLIAM POLLOCK, CO-PARTNERS, TRADING AS MARY POLLOCK, A PARTNERSHIP, v. THE UNITED STATES

[No. 44362. Decided May 6, 1940]

On Demurrer

Government contract for sale of buildings and materials not under N. I. R. A. Act.—Contract with the Navy Department for the purchase by plaintiffs of certain structures and materials located at the U. S. Navy Fuel Depot, Melville, Rhode Island, and the demolition of said buildings and removal thereof by plaintiffs, where the contract did not call for payment by the United States to plaintiffs of any sum of money whatever for any service to be performed or materials to be furnished by plaintiffs, was not a contract coming within the provisions of the act of June 25, 1938.

Mr. Maurice Friedman for plaintiffs. *Mr. William N. Wood* was on the brief.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Mr. Currell Vance* and *Mr. Paris Houston* were on the brief.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the Court:

Plaintiffs instituted this suit under an act approved June 25, 1938, entitled "An Act to confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933." (52 Stat. 1197.)

The petition alleges that on July 6, 1933, plaintiffs entered into a contract with the defendant for the demolition of certain coal sheds, U. S. Naval Fuel Depot, located at Melville, Rhode Island; that plaintiffs signed the President's Reemployment Agreement on September 16, 1933, and operated under that agreement until March 24, 1934, on which date plaintiffs signed the Code of Fair Competition for the Scrap Iron and Steel Industry, which code was in effect during the remainder of the contract period; that after July 6, 1933, as a result of the enactment of the National Industrial Recovery Act, and subsequent to August 10, 1933, the cost of labor and materials necessary for the performance by plaintiffs of their contract increased materially over the costs which they anticipated and that they incurred costs not contemplated under the contract, suffered losses, and were damaged to the extent of $3,238.36.

The defendant demurs to the petition on the ground that it fails to state a cause of action against the Government for the reason that the contract between plaintiffs and the defendant, upon which the suit is based, discloses upon its face that the cause of action is not within the purview of the act of June 25, 1938.

The act of 1938 conferred upon this court jurisdiction to hear, determine, and enter judgments against the United States "upon the claims of contractors, including completing sureties and all subcontractors and materialmen performing work or furnishing material to the contractor or another subcontractor, whose contracts were entered into on or before August 10, 1933, for increased costs incurred as a result of the enactment of the National Industrial Recovery Act: *Provided*, That (except as to claims for increased costs incurred between June 16, 1933, and August 10, 1933) this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C., secs. 28–33)."

We are of opinion that the demurrer is well taken and must be sustained for the reason that the contract upon which the suit is based was a contract of sale by defendant

to plaintiffs of the structures and materials therein specified in the contract in consideration of $7.77 and the demolition and removal thereof by plaintiffs. The contract between the parties is comprised in an invitation for sealed bids for the purchase of certain condemned material belonging to the United States Navy located at the U. S. Naval Fuel Depot, Melville, Rhode Island, described in said invitation, and upon the terms and conditions set out at length therein, and in plaintiffs' written offer in response to certain invitations for bids, and in the acceptance of such offer on behalf of the defendant by the supply officer at the U. S. Naval Fuel Depot. Examination of this contract exhibited with the petition filed discloses that it is a contract of sale by the United States to plaintiffs rather than a contract for the performance of work and labor for and the furnishing of materials to the United States at a fixed or unit price. The contract did not call for payment by the United States to plaintiffs of any sum of money whatever for any service to be performed or materials to be furnished by plaintiffs. The contract, so far as material here, provided that—

> The material will be sold as it lies, and must be removed by the original purchaser at his own expense. Full payment must be made before material is removed.
>
> The contractor will be required to raze completely the sheds, towers, and trestle to the ground or foundation level. On all of these lots the contractor must clear thoroughly and clean up all areas worked over.
>
> When an award is made and the purchase price is paid, the material so awarded becomes the property of the successful bidder, and the Government assumes no further responsibility.

The sale to plaintiffs of the materials in question was made under the act of June 30, 1890, Title 34, U. S. Code, sec. 543, which provides as follows:

> *Sale of condemned supplies, stores, and materials.*—The Secretary of the Navy is authorized to sell, after advertisement of the sale for such time as in his judgment the public interests may require, condemned naval supplies, stores, and materials, either by public auction or by advertisement for sealed proposals for the purchase of the same.

In view of the nature of the contract upon which the petition is based and the provisions of the statute under which it was made, we are of opinion that the claim of plaintiffs is not one coming within the provisions of the act of June 25, 1938, *supra*, for the reason, as held by the Comptroller General on February 5, 1935, under a similar statute of June 16, 1934, 41 U. S. Code 28-33 (14 Dec. Comp. Gen. 592), that "The act has no application to purchasers from the Government, and does not authorize the reimbursement of such purchasers for decrease in profit, increased costs of production, or losses sustained."

The act of June 16, 1934, which so far as material in the present case was the same as the act of June 25, 1938, provided for the determination and settlement by the Comptroller General of claims of Government contractors for additional costs incurred by reason of the enactment of the National Industrial Recovery Act, and, upon a contractor's claim similar to the claim involved in the case at bar the Comptroller General further held at page 594, *supra*, as follows:

> The purpose of the act was the relief of those who had entered upon a specific undertaking to perform work for or furnish supplies or material to the Government, after advertising and competitive bidding according to law, basing their bid prices upon prevailing costs of labor and material, and thereafter were faced with loss due to compliance with codes of fair competition.
>
> The contract here is not within that category. It is merely a purchase of timber from the Government by a lumber company to be marketed at a profit. If, as claimed, the company's overhead expenses were increased by reason of code compliance, there was, presumably, an increase in the prices charged by the company for its products. Manifestly, if the producer increased the sale price of its product to cover increased cost due to code compliance, there is no basis for seeking any adjustment from the Government. The Government, however, is not concerned with the realization or amount of profit by the purchaser.

We concur in the Comptroller General's decision as to the intent and purpose of the act with reference to reimbursement for increased costs by reason of the enactment of the

National Industrial Recovery Act and hold that his construction as to the act of June 16, 1934, is applicable alike to the act of June 25, 1938, since in the act of 1938 the Congress adopted, so far as material to the present case, the same language as that used in the act of 1934. (48 Stat. 974.)

The defendant's demurrer is therefore sustained and the petition is dismissed.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

HOWARD DONNELLY v. THE UNITED STATES

[No. 44442. Decided May 6, 1940]

On the Proofs

Pay and allowances; rental allowance on temporary station while quarters are assigned at permanent station.—Where plaintiff, a major in the United States Army, stationed at a permanent Army post where he was assigned to and occupied bachelor quarters, was, on May 31, 1933, ordered to temporary duty with the Civilian Conservation Corps, and performed said temporary duty until August 16, 1934, and where during the period from June 1, 1933, to November 15, 1933, he was assigned as quarters an officer's wall tent without flooring, with open air bath and latrine facilities, and where during said period the quarters assigned to him at his permanent station were not relinquished by him, occupied by other officers or assigned to other officers, it is held that plaintiff is not entitled to recover rental allowances for the period stated.

Same.—An officer is not entitled to have quarters assigned to him at his permanent station and also receive rental allowances at his temporary station.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

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Reporter's Statement of the Case

The court made special findings of fact as follows:

1. On May 31, 1933, plaintiff, then a Major, United States Army, was stationed at Fort Benjamin Harrison, Indiana, where he was assigned to and occupied bachelor quarters on the post.

Plaintiff's exhibit No. 1, consisting of Reply of the War Department, filed February 15, 1939, is by reference made a part of these findings.

2. Under date of May 31, 1933, Special Orders, No. 125, were issued by the Headquarters, Fifth Corps Area, Fort Hayes, Columbus, Ohio, paragraph 10 of which applied to plaintiff and directed him to proceed on or about June 1, 1933, to Clark County Camp, Henryville, Indiana, on temporary duty in connection with the Civilian Conservation Corps for the purpose of commanding Clark County Camp and the 514th C. C. C. Company.

3. Plaintiff reported for duty at Clark County Camp as directed and performed temporary duty there until about August 1, 1933, when he departed from the camp under orders assigning him to duty at Civilian Conservation Corps Work Camp 55–S, Jackson County State Forest.

4. Plaintiff remained on temporary duty at Civilian Conservation Corps, Work Camp 55–S, until about November 30, 1933, when he departed from the camp under orders assigning him to temporary duty at Headquarters, Eastern District, Civilian Conservation Corps, Indiana Camp S. P.–6, where he served on temporary duty until August 16, 1934. He continued to serve at Camp S. P.–6 after August 16, 1934, but on that date his station there was changed from a "temporary duty" station to a "permanent duty" station.

5. Plaintiff's assignment of quarters at Fort Benjamin Harrison, Indiana, was not terminated upon his departure from the post on May 31, 1933, on assignment to temporary duty with the Civilian Conservation Corps, although it does not appear that he requested that the said assignment of quarters be continued.

On December 19, 1933, plaintiff wrote to the Commanding General, Fort Benjamin Harrison, Indiana, requesting that his assignment of quarters at Fort Benjamin Harrison, Indiana, be terminated. On December 26, 1933, plaintiff

was informed that as his quarters were needed for use of officers actually on duty at Fort Benjamin Harrison, Indiana, there would be no objection raised to his vacating his quarters at the post and having his assignment thereof terminated by Headquarters. Despite the fact that no objection was made to the termination of his assignment of quarters at Fort Benjamin Harrison, Indiana, his quarters assignment was not actually terminated until August 18, 1934, when it was terminated under the provisions of Par. 2, *b k* (1) (d), Army Regulations 210-70.

6. During the period from June 1, 1933, to August 16, 1934, while plaintiff was assigned to and performing temporary duty in connection with the Civilian Conservation Corps, he was furnished as quarters an officer's wall tent without flooring, with open air bath and latrine facilities, which he occupied until November 15, 1933.

After the last-mentioned date he was furnished as quarters one room in a building of rigid type construction, with roofing paper on outside walls and wallboard finish inside, heated by a coal stove, with community type shower and toilet facilities, which he occupied until August 18, 1934.

7. Rental allowances for an officer of plaintiff's rank and service for the period from June 1, 1933, to November 15, 1933, amount to $280.50.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the Court:

In plaintiff's petition claim is made for rental allowances for the period from June 1, 1933, to August 1, 1934. However, the claim has been reduced by the plaintiff to a period from June 1, 1933, to November 15, 1933.

On May 31, 1933, plaintiff was stationed at Fort Benjamin Harrison, Indiana, where there was assigned to and occupied by him bachelor quarters on the post. On this date he was directed to proceed to Clark County Camp, Henryville, Indiana, for temporary duty in connection with the Civilian Conservation Corps. Plaintiff performed tem-

Syllabus

porary duty there until August 1, 1933, when he departed from the Camp under orders assigning him to duty at Civilian Conservation Corps Work Camp 55-S, Jackson County State Forest, where he remained during the period of his claim.

The facts show that plaintiff was assigned bachelor quarters at his permanent station and these quarters were not relinquished by him, occupied by other officers, or assigned to other officers during this period. Plaintiff did not request that his assignment of quarters be terminated at his permanent station until December 6, 1933, which was after the period for which he claims rental allowances.

An officer is not entitled to have quarters assigned to him at his permanent station and also receive rental allowances at his temporary station. When plaintiff requested the termination of the quarters assigned to him at his permanent station, his request was granted. This request, however, was not made until after the period for which plaintiff claims recovery. See *Underwood* v. *United States*, *post*, p. 268. Plaintiff is not entitled to recover. It is so ordered.

LITTLETON, *Judge*, and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

POINSETT LUMBER AND MANUFACTURING COMPANY, A CORPORATION; THE SINGER MANUFACTURING COMPANY, A CORPORATION; BANK OF COMMERCE AND TRUST COMPANY, AS TRUSTEE; AND DRAINAGE DISTRICT NO. 6, BY ITS COMMISSIONERS, WILLIAM MAURICE SMITH, CLARENCE GRADY COATS, AND THOMAS DENVER HARE, v. THE UNITED STATES

[No. 44687. Decided May 6, 1940]

On Demurrer

Flood control; taking of private property for public use.—Decided upon the authority of *United States* v. *Sponenbarger et al.*, 308 U. S. 256, and *Danforth* v. *United States*, 308 U. S. 271, 287.

Same.—In order to constitute a taking such as will entitle an owner to maintain a suit against the Government for compensation, the acts of the Government must constitute an actual invasion and dispossession of the use and occupancy of the property.

Mr. Joe C. Barrett for the plaintiffs. *Messrs. Lamb & Barrett* on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

The defendant demurs to the second amended petition filed herein on the ground that the facts set forth therein do not state a cause of action against the United States entitling plaintiffs to recover.

The essential facts alleged and set forth in the petition, so far as are necessary to a determination of the question raised by the demurrer, are that plaintiff, the Poinsett Company, is the owner of a tract of timberland situated in Cross County, Arkansas, comprising more than 21,000 acres of the value of $1,366,845, which, it is alleged, has been appropriated and taken by the defendant under and by virtue of the following acts and circumstances:

1. The enactment of the act of June 15, 1936, 49 Stat. 1508, and subsequent legislation providing for the construction of certain levees along the St. Francis River and along the right-hand chute of Little River, a tributary thereof, in the states of Missouri and Arkansas, and the appropriation of money for that purpose; the making of extended surveys by the defendant of its lines for constructing such levees.

2. The acceptance by defendant of assurances furnished by numerous local improvement districts, with the exception of Drainage District No. 6 within which plaintiffs' property is situated. The entry upon the land by Government surveying parties at divers times for the purpose of fixing and establishing a line upon which or along which levees will be constructed by defendant as a part of and in accordance with a plan of levee construction.

Opinion of the Court

3. The construction by the defendant of levees at Big Lake, sixty miles to the north of plaintiffs' land; along the right-hand chute of Little River, thirty miles to the north of plaintiffs' property; and the partial construction of Wappapello Dam in the State of Missouri, one hundred miles to the north of the land in controversy.

4. The contemplated or planned construction of levees on both sides of the St. Francis River from Wappapello Dam to the northern terminus of Sand Slough and thence along the lines of levees previously constructed by local interests on either side of Sand Slough to plaintiffs' property; that where said Wappapello Dam and levees are constructed and connected in a complete system, the water from the river "will be forced over said lands of Poinsett Company, resulting in their entire destruction, including the standing timber thereon, and render them of no value."

From the primary and essential facts alleged in the petition, as distinguished from conclusions, we are of opinion that none of the essential elements necessary to constitute a taking is shown by the facts alleged. Nothing that has been done by the defendant's engineers since the passage of the act of June 15, 1936, has directly caused the diversion of water from the St. Francis River to flow over or be impounded upon any of the property in question. Plaintiffs have not been ousted or dispossessed of any of their property as the result of construction by the defendant of any levees, nor has the defendant at any time encroached upon their property, either by construction of levees thereon or by causing headwaters or backwaters to flow over or be impounded thereon. The construction work by the defendant has not had the effect of interfering with plaintiffs' use or occupation of their lands.

In order to constitute a taking, such as will entitle an owner to maintain a suit against the Government for compensation, it must definitely appear that there has been an actual physical invasion or encroachment upon private property by the government, or else such a direct physical destruction or deprivation of use as to permanently dispossess the owner and oust him of the beneficial use and enjoyment thereof. The facts alleged fail to show that this has occurred.

The facts alleged show no more than that plaintiffs anticipate that, if the contemplated project is completed, their lands and the beneficial use thereof will be destroyed by flowage of water thereon, but the mere adoption of the plan is not the equivalent of a taking. The acts of the Government must constitute an actual invasion and dispossession of the use and occupancy of the property by the owners.

In *United States* v. *Sponenbarger et al.*, 308 U. S. 256, the court held that a plan or program is not tantamount to and does not constitute a taking; and at page 267, the court said:

> Even though the Government has not interfered with respondent's possession and as yet has caused no flooding of her land, respondent claims her property was taken when the 1928 Act went into effect and work began on its ten-year program because the Act itself involves an imposition of a servitude for the purpose of intentional future flooding of the proposed Boeuf floodway. But, assuming for purposes of argument that it might be shown that such supposed future flooding would inflict damages greater than all benefits received by respondent, still this contention amounts to no more than the claim that respondent's land was taken when the statutory plan gave rise to an apprehension of future flooding. This apprehended flooding might never occur for many reasons—one of which is that the Boeuf floodway might never be begun or completed. As previously pointed out, the Act directed comprehensive surveys before utilization of any means of flood control other than levees and revetments. In general language it adopted a program recommended by the Chief of Army Engineers, but Congress did not sweep into the statute every suggestion contained in that recommendation.
>
> Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress. Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

In *Danforth* v. *United States*, 308 U. S. 271, 286, 287, the court said:

> This leaves for consideration the contention that there was a taking by the enactment of the legislation, when work began on the set-back levee or when that

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levee was completed. The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail.

For completion of the set-back levee to amount to a taking, it must result in an appropriation of the property to the uses of the Government. This levee is substantially complete. The Government has condemned the land upon which the set-back is built. The tract now in litigation lies between the set-back and river-bank levees. The Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction. The river-bank levee at the fuse plug has not been lowered from its previous height. Consequently the land is as well protected from destructive floods as formerly. We cannot conclude that the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee, has the effect of taking. We agree with the Court of Appeals that this is "an incidental consequence" of the building of the set-back levee.

In view of the facts alleged, and upon the authority of the cases cited, the demurrer must be sustained and the petition is therefore dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JOE S. UNDERWOOD v. THE UNITED STATES

[No. 44544. Decided May 6, 1940]

On the Proofs

Pay and allowances; rental allowances for an Army officer on temporary duty with Civilian Conservation Corps while retaining quarters at permanent station.—Where plaintiff, then a captain in the Quartermaster Corps, United States Army, permanently stationed at Fort Lewis, Washington, where he was assigned to and occupied bachelor quarters, was ordered to temporary

duty with the Civilian Conservation Corps, entering upon said temporary duty on May 11, 1933, and being assigned to no Government quarters, and where plaintiff on leaving his permanent station took with him the keys to his quarters at said permanent station, and did not surrender said keys until January 19, 1934, whereupon at his request the assignment of quarters at his permanent station was terminated by order of January 23, 1934, it is held that plaintiff is not entitled to recover for rental allowances for the period from May 10, 1933, to January 23, 1934.

Same.—Where plaintiff, a captain in the United States Army, in departing on May 9, 1933, from his permanent station for temporary duty with the Civilian Conservation Corps took with him the keys to his quarters and left his furniture therein, and where on October 2, 1933, plaintiff made a written request that his assignment to quarters at his permanent station be terminated but did not at that time return said keys, so that his furniture could be removed and stored, it is held that plaintiff is not entitled to recover for rental allowances while serving temporarily with the Civilian Conservation Corps, no Government quarters of any kind being furnished to him. The case of *O'Mohundro* v. *United States*, 84 C. Cls. 262, is distinguished.

The Reporter's statement of the case:

King & King for the plaintiff. *Mr. Fred W. Shields* was on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On May 6, 1933, plaintiff, then a captain in the Quartermaster Corps, United States Army, was permanently stationed at Fort Lewis, Washington, where he was assigned to and occupied bachelor quarters.

2. Paragraph 21 of Special Orders No. 77, issued by Headquarters Ninth Corps Area, Presidio of San Francisco, California, dated May 6, 1933, directed plaintiff to proceed to Eureka, California, for temporary duty with the Civilian Conservation Corps, and upon completion of said duty to return to his proper station. By these orders plaintiff was permitted to travel by his own automobile and was allowed

a flat $5.00 per diem while traveling and while on temporary duty, not to exceed a period of 30 days.

3. Plaintiff stated on his pay voucher for per diem allowance that he departed from his station at Fort Lewis at 3 p. m., on May 9, 1933, by automobile, and arrived at Eureka at 8 p. m., on May 11, 1933, and reported for duty on the same day.

4. While performing duty at Eureka, by letter dated October 2, 1933, addressed to the Commanding General of the Ninth Corps Area, Presidio of San Francisco, California, plaintiff requested that he be relieved from assignment of quarters at Fort Lewis and that no quarters be reassigned to him at that station, in order that he might be entitled to rental allowances.

By fifth indorsement of the Commanding General, Headquarters, Fort Lewis District Civilian Conservation Corps, dated October 19, 1933, to the Commanding General, Ninth Corps Area, Presidio of San Francisco, plaintiff's request was not favorably considered, because he was then assigned suitable quarters at Fort Lewis.

5. On December 28, 1933, plaintiff again requested of the Commanding General at Fort Lewis that he be relieved from assignment of quarters at that station and be placed on a commutation status and stated that if his request was granted he would request that his furniture in said quarters be stored until his return to said station. On January 16, 1934, the Assistant Adjutant at Fort Lewis directed him to return the keys to his quarters and submit a request for storage of his household goods and advised him that his property would be removed and he would be placed on a commutation status. On January 19, 1934, plaintiff returned the keys to his quarters and requested that his household goods be stored by the Quartermaster pending instructions as to disposition. On January 23, 1934, the Commanding General, Headquarters Fort Lewis, terminated plaintiff's assignment of quarters at that station.

6. Plaintiff's household goods remained in quarters assigned to him at Fort Lewis from May 10, 1933, to January 23, 1934. During that period plaintiff was in posses-

sion of the keys to said quarters and the quarters were otherwise unoccupied. From May 10, 1933, to January 23, 1934, while plaintiff was on duty with the Civilian Conservation Corps at Eureka, no Government quarters of any kind were furnished him.

7. Rental allowances of an officer of plaintiff's rank for the period from May 10, 1933, to January 23, 1934, less the per diem of $5.00 in lieu of actual expenses for 2¼ days while traveling, amount to $428.40.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a captain in the United States Army and claims rental allowances for the period from May 10, 1933, to January 23, 1934, during which time he was absent from his permanent station on temporary duty. At his permanent station, Fort Lewis, Washington, he had assigned to him and occupied bachelor quarters. On May 6, 1933, plaintiff was ordered to proceed to Eureka, California, for temporary duty with the Civilian Conservation Corps. On May 9, 1933, he departed from his permanent post and arrived at his temporary post of duty on May 11, 1933, and remained on temporary duty at this post during the entire period covered by this claim. When plaintiff departed from his permanent station, he took with him the keys to his quarters and left his furniture in the quarters assigned to him at the post. On October 2, 1933, he made a written request that his assignment of quarters at Fort Lewis be terminated but he did not return the keys to his quarters. This request was not favorably considered. On December 28, 1933, plaintiff again requested termination of his assignment of quarters at his permanent post, stating that, if his request were granted, he would request that his furniture at his quarters be stored. On January 16, 1934, he was directed to return the keys of his quarters and submit a request for the storage of his furniture, and also advised that his property would be removed and he would be placed on rental allowance status.

On January 19, 1934, plaintiff returned the keys to his quarters with the request that his furniture be stored by the Quartermaster pending instructions as to its disposition. On January 23, 1934, the Commanding General at Fort Lewis terminated plaintiff's assignment of quarters at his permanent station.

During the period from May 10, 1933, to January 23, 1934, while plaintiff was on temporary duty at the Civilian Conservation Corps at Eureka, California, he was not furnished Government quarters at his temporary station.

Section 6 of the Act of June 10, 1922 (42 Stat. 625, 628), as amended by Section 2 of the Act of May 31, 1924 (43 Stat. 250, 251), provides:

> Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, * * * while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *
>
> * * * * *
>
> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank * * *.
>
> Regulations in execution of the provisions of this section in peace and in war shall be made by the President * * *.

Army Regulation 210–70 in effect during the period of this claim provided:

> 2 bk (1) An officer's assignment of quarters at his permanent station will be terminated by the commanding officer under the following conditions only:
>
> * * * * *
>
> (c) On his departure from his permanent station * * * on temporary duty, * * * under orders which relieve him from duty at his permanent station during or at the termination of his absence, unless the officer files request to the contrary.

This regulation means the permanent station of the officer must be changed during his temporary duty or at the termination of his absence.

Executive Order No. 4063, of August 13, 1924, issued pursuant to the provisions of section 2 of the Act of May 31, 1924, *supra*, is as follows:

> I. (e) The term "permanent station" as used in this Act shall be construed to mean the place on shore where an officer is assigned to duty * * * under orders in each case which do not in terms provide for the termination thereof.
>
> * * * * *
>
> III. (c) No officer shall be paid a rental allowance for any period during which he is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank, or a less number of rooms which have been determined in accordance with these regulations to be adequate in the particular case.

It is admitted that plaintiff was on temporary duty with the Civilian Conservation Corps and that bachelor quarters were assigned to him at his permanent station. The plaintiff contends that his case is controlled by the decision in the case of *O'Mohundro* v. *United States*, 84 C. Cls. 262, and that he is entitled to rental allowances because it was impossible for him to occupy the quarters assigned to him at the permanent station while he was absent from that station and that his assignment of quarters should have been terminated upon his departure from his permanent station for temporary duty. There is nothing in the record to show he would not return to his permanent station after his temporary duty had ended.

In the case above cited and upon which plaintiff relies, the facts are entirely different. O'Mohundro's assignment of quarters at this permanent station was not terminated upon his assignment to temporary duty, but later his household goods were removed and his quarters were available for assignment and were, in fact, occupied by other officers during the entire period he was on temporary duty.

The quarters assigned to plaintiff at his permanent station were not available for assignment to other officers for the reason that plaintiff had taken the keys away with him and retained them. He had in his quarters his furniture which could not be removed so as to make the quarters available for other officers. The facts show that as soon as plaintiff

returned the keys to his quarters so that his furniture could be removed and his quarters made available for assignment to other officers, his assignment was terminated by his Commanding Officer.

Plaintiff is not entitled to recover and his petition is dismissed.

It is so ordered.

LITTLETON, *Judge*, and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JOHN C. JOHNSTON AND WILEY B. COARSEY, COPARTNERS, TRADING UNDER THE FIRM NAME OF J. C. JOHNSTON CONSTRUCTION COMPANY, TO THE USE OF THE POWELL-GAUEN COMPANY, A CORPORATION v. THE UNITED STATES

[No. 43146. Decided June 3, 1940]

On the Proofs

Government contract; recovery for amount deducted.—Where plaintiffs, contractors, made their bid for the construction of a Mississippi River levee on the basis of excavating and placing the necessary material called for to construct said levee, and where a portion of the material was excavated and placed. at the defendant's direction, by another contractor engaged in the excavation of drainage ditches along part of the said levee, it is held that plaintiffs are entitled to recover the amount deducted for the yardage involved.

Same.—Where plaintiffs did not comply with the provisions of the contract requiring contractor within ten days from the beginning of any delay to notify the contractor in writing of the causes of said delay, and stipulating that the findings of the contracting officer, after investigation, should be final, it is held that plaintiffs are not entitled to recover for liquidated damages deducted for such delay.

The Reporter's statement of the case:

Mr. George R. Shields for plaintiffs. *King & King* and *Mr. William M. Hall* were on the brief.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiffs contracted to build a levee near New Madrid, Missouri, of about five miles in length, with material to be excavated from a drainage canal on the landside of the levee. They seek to recover $20,159.25 made up of four items: $17,392.24 alleged to be due for certain excavation for which it is alleged the defendant failed to pay in accordance with the contract, $612.75 for a certain number of cubic yards placed at road crossings on the levee, $1,384.25 representing a certain number of cubic yards of material which was excavated by another contractor and placed in the levee to be constructed by plaintiffs, for which the defendant did not pay plaintiffs, and $770 as liquidated damages deducted by the defendant at the rate of $10 a day for 77 days' delay in completing the contract.

The defendant insists that plaintiffs were paid strictly in accordance with the terms of the contract and specifications and that no additional amount is due, and, further, that failure to complete the contract within the time specified therein was due to the fault of the contractors rather than to any fault of defendant, or to unforeseeable causes or unusually severe weather conditions.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The J. C. Johnston Construction Company is a partnership consisting of John C. Johnston and Wiley B. Coarsey, both residents of Tampa, Florida.

2. The J. C. Johnston Construction Company on September 6, 1929, entered into a formal written contract with the United States for furnishing all labor and material and performing all work required for constructing a new levee in Birds Point-New Madrid Floodway Levee from about station 18/34 to about station 24/0, containing about 2,153,000 cubic yards of earthwork, and excavating a drainage canal to certain minimum dimensions in connection with the construction of the levee. The contract provided that plaintiffs would be paid at the rate of 25 cents a cubic yard. The contract and specifications are of record as plaintiffs' exhibit 1, and drawing entitled "Piece No. 4C, Birds Point-New Madrid Floodway Proposed Back Levee" is of record as

defendant's exhibit B, both being made a part of this finding by reference.

3. Under the provisions of the contract plaintiffs should have commenced work by November 7, 1929, and completed it by December 14, 1931. Work was commenced according to contract, but it was not completed until February 29, 1932.

Defendant called plaintiffs' attention several times to their poor progress. On May 16, 1930, under the uniform rate of progress provided in the contract there should have been more than 400,000 cubic yards placed, yet there had been only about 5,000 cubic yards placed. On May 16, 1930, all work remaining to be done under the contract was sublet to the Powell-Gauen Company, an Illinois Corporation, for whose use this suit was filed. On May 29, 1930, the work was undertaken and full responsibility for its completion was assumed by the Powell-Gauen Company.

4. The instant contract contemplated two accomplishments—the construction of a levee to protect against the Mississippi flood waters and also the construction of a drainage canal which would accommodate the flow of water from connecting drainage ditches on the landside of the levee and carry off rain water.

"General Provisions—(a)" of the contract reads:

> This levee will cross and close several main drainage channels. Several highways will also be crossed by the levee. The United States is providing an intercepting ditch system to take care of the drainage. * * *

Specification 39 provides in part:

> Maps: The work shall conform to the map marked "Serial 1776, file 103/1," and entitled "Piece No. 4C, Birds Point-New Madrid Floodway, Proposed Back Levee" which forms a part of these specifications, and which is filed in the United States Engineer Office at Memphis, Tenn.

5. Other pertinent provisions of the specifications read:

> (a) Borrow pit location: The levee in this piece shall be constructed from the material taken from a drainage canal to be dug parallel to the levee to a definite grade and section as provided herein.

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(b) *Cross section of levee:* The minimum levee section for this piece will be as follows:

From levee stations 18/34 to 18/45, crown width 10 feet, riverside slope 1 on 3½, landside slope 1 on 5.

From levee stations 18/45 to 24/0, crown width 10 feet, riverside slope 1 on 3½, landside slope 1 on 4½.

(c) *Disposition of excess material:* Along some of this work the necessary drainage canal excavation will be greater than the yardage required to build the levee section. In case it is desired to enlarge the levee section to take care of this excess material, the section as stated in the above paragraph may be increased in the following manner: The crown may be widened, and the height raised not to exceed 3 feet, but the slopes as given must be maintained. In no case shall the landside toe extend more than 50 feet beyond the toe of the standard height levee without special permission of the contracting officer, or the riverside toe extend beyond the limits of the right-of-way as provided by the United States. Dressing and sodding of any enlarged section will be required in the same manner as that of the regular section.

However, if the contractor desires to shorten the haul in the disposition of some of this excess material, and instead of placing all this material in the enlarged levee section on the right-of-way as provided by the United States, he may construct a spoil bank on the landside of the canal provided that a 100-foot berm is maintained between the toe of the spoil bank and the back of the excavation; that the spoil bank be not over 15 feet high; that openings for drainage be left in the spoil bank at any point designated by the contracting officer; and that any additional width of right-of-way required for this spoil bank and berm be provided at his own expense.

(d) *Cross section of drainage canal:* Two different canal cross sections will be used in the construction of the canal on this piece. These sections will be designated as Section No. 1 and Section No. 2, and will be as follows:

(1) *Section No. 1.*—This section will begin 100 feet from the landside toe of the levee. From this point the section will have a slope landward of 1 on 5 to a depth of 2 feet; and then a slope of 1 on 15 to the bottom grade of the canal. The bottom width will be 60 feet and the back slope 1 on 3.

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(2) *Section No. 2.*—This section will begin 150 feet from the landside toe of the levee. From this point the section will have a slope landward of 1 on 8 to the bottom grade of the canal. The bottom width will be 75 feet and the back slope 1 on 3.

Section No. 1, levee stations 18/34 to 21/0 and 22/6 to 24/0.

Section No. 2, levee stations 21/0 to 22/6.

In balancing the levee section and the canal section some slight variation of the canal section as given above may be allowed but the required berm, bottom depth, and back slope must be as stated. Generally, Section No. 2 is used where Section No. 1 will provide too great an excess of material. At points where Section No. 1 does not provide enough material to complete the levee, this section may be increased by deepening the canal provided the material obtained by the deepening is, in the judgment of the contracting officer, satisfactory for levee building and provided the 1 on 15 slope away from the levee and the 1 on 3 back slope are maintained; or the necessary additional material may be obtained by widening the canal toward the landslide provided the 1 on 3 back slope is maintained; or by both widening and deepening.

(e) *Excavation for drainage canal.*—The drainage canal must be excavated to neat lines and the sides and bottom of the excavation must be free from ridges and furrows across the line of flow. If the method of excavation does not provide a fairly smooth and regular channel, the contractor will be expected to dress this section to the condition described, and to have the canal free of all foreign matter such as logs, stumps, brush, etc.

(f) *Traverses:* Separate contracts will be let by the United States for the construction of bridges where crossings of drainage borrow pits are required. In order to maintain the flow of traffic it may be necessary to leave traverses across these drainage borrow pits to permit the passage of traffic before the bridges are complete. Where such traverses are necessary the contractor will be directed to leave them and will be relieved of removing the material in these traverses under his contract.

However, the contractor, if he so desires, may on approval of the contracting officer remove a traverse temporarily and in lieu thereof, for the benefit of the traffic, provide and maintain in good condition conven-

ient detours, but the traverse must be replaced or a substantial wooden bridge built across the canal before the detour becomes long or troublesome. If the contractor removes a traverse, all expenses in connection with its replacement, or the erection of a wooden bridge in lieu thereof and of providing and maintaining the detours shall be borne by him.

(g) *Payment:* Payment will be made on the *net levee section yardage* when same is in excess of the required drainage canal section yardage; but when the yardage of the required drainage canal section is in excess of that of the net levee section, payment will be made for the quantities in the *required drainage canal section.*

In determining which method of payment will be used no length of levee of less than 300 feet will be considered.

6. Article 3 of the contract reads:

Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Paragraph 14 of the specifications reads:

Modification of specifications.—The right is reserved to make such minor changes in the work contemplated under these specifications as may be necessary or expedient to carry out the intent of the contract or to meet conditions not now anticipated; but no such modification shall be made the basis of a claim for extra compensation, except as provided in the regular form of contract to be entered into.

7. The height of the levee, the crown width, and the side slopes were disclosed by the drawings and specifications. They specified a distance of either 100 or 150 feet between the land toe of the levee and the riverside edge of the drainage canal. The levee and the canal were to be built on center lines established by Government engineers. The levee side slope of the canal could not be strictly maintained at 100 or 150 feet from the levee without making this slope of the canal irregular, due to the fact that the ground was not perfectly level. The original drawings showed such irregularity in the ground surface. When an increase in the elevation of the ground surface was encountered the engineers required plaintiffs to keep the fixed distance between the levee and the canal by changing the dimension of the riverside slope of the canal, which would bring the slope to the surface of the ground at a sharper angle than was indicated in the specifications. But in measuring for payment no deduction was made because of the changed angle of the riverside slope at such points.

The riverside slope was not increased except for slight changes made where certain sections were joined and the slope was increased to maintain an even cut. Plaintiffs were required to excavate materials for use in the gross levee from outside the landside limits of the proposed canal, but they were not paid for the material so excavated. However, plaintiffs were paid on the basis of cubic content of the required drainage canal as staked out in accordance with the specifications where such cubic content exceeded the corresponding net levee section whether or not plaintiffs actually so excavated the drainage canal.

8. Paragraph 27 of the specifications reads:

> **Shrinkage.**—The allowance for settling or shrinkage of embankment will be nothing for hydraulic dredge work, 15 percent of the net fill for scraper work or tractor and wagon work, 20 percent for animal and wagon work, and 25 percent for other methods including dragline and other machine scrapers regardless of the material used. The allowance for shrinkage or settling must be so disposed on top and slopes as to give the required width of crown, and to fill out the slopes so as to make plane surfaces from edge of crown

> to base of levee after shrinkage has practically ceased. No embankment that is not carried up as above specified will be paid for. Payment will be made for contents of the levee, as computed to the net grade and section only.

Under the terms of the contract plaintiffs were required to obtain the materials used in the construction of the levee from the drainage canal, but not necessarily from within the prescribed dimensions of the required drainage canal, and were to be paid for their work as follows:

(a) When the net levee section was in excess of the required drainage canal section payment was to be made on the net levee section; but—

(b) When the required drainage canal section was in excess of the net levee section payment was to be made for the quantities in the required drainage canal section.

Plaintiffs used tractors and wagons for the greater part of the work, which method required the placement of 15 percent additional material for shrinkage. On some parts of the work the tractor and wagon equipment was augmented by dragline machines, which method required 25 percent shrinkage.

If plaintiffs had been permitted to excavate a canal exactly in accordance with the plans and specifications, it would still have been necessary to excavate large quantities of yardage beyond the limits of the entire canal in order to procure sufficient material to build the entire levee to the required net grade and section. Plaintiffs excavated 73,570 cubic yards of material from outside the dimensions of the required drainage canal as laid out by defendant's engineers. Defendant has not paid plaintiffs for any part of the 73,570 cubic yards of material so excavated, but has paid for the entire yardage in the required drainage canal section. In other words, where the net levee dimensions at certain sections exceeded the yardage of the corresponding section of the required drainage canal, payment in each instance was made on the basis of yardage in the net levee section, and where the cubic content of the required drainage canal at certain sections exceeded the specified dimensions of the corresponding net levee section payment was made on the basis of the canal yardage.

Plaintiffs did not protest to the contracting officer about the changes so made by defendant's engineer, nor did plaintiffs take an appeal to the head of the department.

9. While plaintiffs were performing their work under this contract defendant entered into a contract with Clarke Brothers Construction Company for the excavation of two drainage ditches along the side of the northern part of plaintiffs' work. It was to connect the drainage canal with adjacent drainage ditches. At the direction of defendant's engineer and over the protest of plaintiffs, 5,537 cubic yards so excavated by Clarke Brothers were placed within the confines of the levee covered by plaintiffs' contract. Defendant deducted the sum of $1,384.25 from the amount due plaintiffs, which sum represented the cost of excavating 5,537 cubic yards at 25 cents a yard. This material was deposited by Clarke Brothers in a rough condition. Plaintiffs had to dress it to a fairly smooth surface in order to operate their hauling equipment, for which work plaintiffs received no pay from defendant, but were paid $100 therefor by Clarke Brothers Construction Company.

10. Paragraph 31 of the specifications reads:

> **Road crossings.**—Road crossings shall be constructed at such points and of such dimensions as may be designated by the contracting officer, and will be paid for at the same price per cubic yard for the net cubic contents as for the levee itself.

Plaintiffs constructed three roadway crossings—one at station 18/36, one at station 21/18, and one at station 21/51, in the construction of which plaintiffs used 2,451 cubic yards of material. Each of these crossings was constructed at a point where plaintiffs were being paid on the canal excavation basis provided for in the contract, the defendant's engineer having determined that the required canal excavation exceeded the net levee section at each of the three points. The proof does not show that this determination was erroneous.

11. Plaintiffs agreed to complete all work under the contract by December 15, 1931. It was actually completed on February 29, 1932—a delay of seventy-seven (77) calendar days. Defendant deducted from payments made to plain-

tiffs the sum of $770, covering the 77 days at the rate of $10 a calendar day.

Weather conditions were favorable for the performance of the work contemplated by the contract until November 18, 1931, by which time plaintiffs, under their contract, had work remaining which involved the moving and placing of 42,757 cubic yards of material. From the commencement of the work up to June 1, 1931, plaintiffs' progress was in arrears, although frequently urged by defendant to increase their progress. On June 1, 1931, there remained 904,451 cubic yards of material to be placed. Thereafter plaintiffs placed an average of 155,000 cubic yards a month. The delay of plaintiffs ran the work over into the normally rainy season of November and the normally high-water season during the months of December, January, February, March, and April. On November 18, 1931, it began to rain and continued intermittently until the contract was completed. The river rose out of its banks and backed up in the drainage canal to within two feet of the top.

At the time the work was suspended, on November 18, plaintiffs' equipment was capable of placing 7,000 cubic yards a working day during favorable working conditions. Plaintiffs did not notify the contracting officer in writing within ten days after the beginning of the delay of the cause thereof, and no appeal was made by plaintiffs to the head of the department within thirty days.

The court decided that the plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The contract involved in this suit called for and required the construction of a levee and the excavation of a drainage canal of about five miles in length on the Mississippi River near New Madrid, Missouri. The pertinent portions of the contract and specifications are set forth in the findings. The contract provided that the material for the levee should be, and it was, procured from excavation of the drainage canal which was dug landward of the levee and parallel thereto. The construction of the levee necessitated excavation for the drainage canal inasmuch as existing drainage ditches

were cut off by the new levee, and without the drainage canal such ditches would not have been suitable for drainage purposes. The canal was constructed for drainage purposes from drainage ditches on the landside of the levee.

Plaintiffs insist that they were not paid for 69,569 cubic yards of material required to be excavated in constructing the levee, and that no payment was made for 2,451 cubic yards of material excavated and placed in road crossings at certain points in the levee; that the defendant erroneously and illegally failed to pay plaintiffs with respect to 5,537 cubic yards at 25 cents a cubic yard for material which had been excavated by another government contractor and placed at the site of the levee constructed by plaintiffs, and that the defendant illegally, and in violation of the contract, deducted and withheld $770 as liquidated damages for 77 days' delay in completing the contract.

We are of the opinion that under the provisions of the contract and upon the facts disclosed and established by the record that plaintiffs are entitled to recover only on the third item of their claim.

It is unnecessary to discuss the facts in detail other than to state that as to the first item they show clearly that measurements for payment were made in accordance with the contract and specifications and that plaintiffs have received payment of the entire amount to which they were entitled under the contract. The contract and specifications are clear that plaintiffs were only entitled to be paid on the basis of the dimensions of the net levee section or the cubical content of the corresponding required canal section, whichever was greater. The record establishes that payment was made on this basis. Plaintiffs contend that they were required to excavate yardage from certain sections of the canal in excess of the dimensions of the required drainage canal section for which they claim payment. But this contention is not supported by the evidence. Plaintiffs are, therefore, not entitled to recover on the first item of the claim.

With reference to the second item of the claim for $612.75 for 2,451 cubic yards of material placed in constructing road crossings on the levee at certain stations where canal yardage was paid for, plaintiffs contend that because such yardage was procured beyond the drainage canal limits and

payments at the points in question were confined to yardage excavated within these limits, no payment has been made for this road crossing yardage. In making payment, the contracting officer treated the road crossing yardage at the points where such yardage was placed in the levee in the same manner in which he treated the levee yardage—that is, when the aggregate of the road crossing yardage and the net levee yardage did not exceed the yardage of the required drainage canal section, he paid for the total cubical content of the required drainage canal section. Paragraph 31 of the specifications provide that "Road crossings shall be constructed at such points and of such dimensions as may be designated by the contracting officer, and will be paid for at the same price per cubic yard for the net cubic contents as for the levee itself." This provision shows clearly that the road crossings were integral parts of the levee and that in determining whether payments should be made on the basis of the net levee yardage or the drainage canal yardage (paragraph 39 (g) of the specifications), the aggregate of the net levee yardage and the road crossing yardage should be compared with the required canal drainage yardage at that section. This the contracting officer did. The evidence shows that at the points in question the aggregate of the road crossing yardage and the net levee yardage combined was less than the yardage of the applicable section of the required drainage canal and that payment was made for the canal section yardage. Plaintiffs are therefore not entitled to recover on this item.

The facts with reference to the third item of the claim for $1,384.25 are set forth in finding 9. They show that this material of 5,537 cubic yards was placed in the levee by Clarke Brothers Construction Company, which company, under contract with the defendant, was engaged in the excavation of two drainage ditches along the northern part of the site of the levee called for by plaintiffs' contract. In measuring for payment to plaintiffs at this section, the defendant excluded this yardage from the dimensions of the net levee in that section and made payment to plaintiffs accordingly. We are of opinion that the defendant was without authority under the contract with plaintiffs to make this deduction. While the plaintiffs did not excavate and

place this yardage in the levee they were ready and able to do so and they protested and objected to the placing of the same in the levee by the defendant, as a result of the contract made by the defendant with Clarke Bros. after plaintiffs' contract had been entered into. Plaintiffs made their bid for the work of excavating and placing the necessary material to construct the levee called for and were entitled under their contract to be paid the amount computed on the basis specified therein. In this respect plaintiffs were not so paid. In making their bid plaintiffs computed their profit on the entire work on the basis of the dimensions of the net levee section or the canal section, whichever was greater. By making this deduction the defendant unlawfully reduced plaintiffs' estimated profit on the work which they agreed to and were obligated to perform. Moreover, there was no provision in plaintiffs' contract which gave the defendant the right to place or have placed in the levee certain of the material necessary for its construction and to deduct the yardage of such material from the measurement specified as the basis of plaintiffs' compensation. Plaintiffs are entitled to recover the amount of $1,384.25 under this item of the claim. Although plaintiffs were paid one hundred dollars by Clarke Brothers Construction Company to compensate them for the work of smoothing or levelling the material placed at the levee site by Clarke Brothers, this amount should not be deducted from the amount due by the defendant at the rate specified in plaintiffs' contract for the reason that Clarke Brothers Construction Company piled this material in an uneven and rough condition on the site of the levee and, for that reason, it was necessary for plaintiffs, in order properly to carry on their work of completing the levee, to do work which would not have been necessary if Clarke Brothers Construction Company had not placed the material in such manner.

The last item of the claim relates to liquidated damages of $770 deducted by the defendant for 77 days' delay in completing the contract on time at the rate of $10 a day. The facts with reference to this delay are set forth in finding 11. They show that plaintiffs are not entitled to recover. It is clearly established that the delay of plaintiffs in properly prosecuting the work caused the work to extend

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into the normally rainy season in November and the normally high-water season during the months of December, January, February, March, and April. If plaintiffs had properly prosecuted the work, the delay beyond the contract period would not have occurred and no liquidated damages would be deductible. The delay cannot, therefore, be attributable to any of the excusable causes provided in Art. 9 of the contract.

Moreover, the plaintiffs did not comply with the provisions of Art. 9 which provide that the contractor should within ten days from the beginning of any delay notify the contracting officer in writing of the causes thereof and that the contracting officer should ascertain the facts and extent of the delay and that his findings of fact should be final and conclusive, subject only to appeal within thirty days to the head of the department whose decision on such appeal as to the facts and the delay should be final and conclusive. The contracting officer found as a fact that the delay in completing the contract on time was the fault of plaintiffs.

Judgment will be entered in favor of plaintiffs in the amount of $1,384.25. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

SAMUEL LEROY SLOVER *v.* THE UNITED STATES

[No. 43301. Decided June 3, 1940]

On the Proofs

Income tax; loss incurred in trade or business.—Where taxpayer in 1928 entered into an agreement with a business associate to purchase from said associate at any time, upon reasonable notice, certain bank stock which taxpayer advised said associate to purchase, and where in 1931, the market value of said stock having declined, taxpayer was called upon by his associate to fulfill his agreement, and did fulfill his agreement, and purchased said stock, which was sold at a loss, it is held that such loss was not a loss incurred in the plaintiff's trade or business, and he is not entitled to recover.

Same.—The transaction was not one "entered into for profit."

The Reporter's statement of the case:

Mr. Frank J. Albus for the plaintiff. *Mr. Hugh E. Wall, Jr.*, was on the brief.

Mr. D. F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the stipulation of facts:

1. The plaintiff is a citizen of the United States and a resident of Norfolk, Virginia. At all times material herein he was principally engaged in the newspaper publishing business, being chairman of the board of the Norfolk Ledger-Dispatch, the evening newspaper of Norfolk. His salary from that source was $36,000 in 1931.

2. On March 15, 1932, plaintiff, reporting on a cash receipts and disbursement basis, filed his individual income tax return for the calendar year 1931 in the office of the Collector of Internal Revenue at Richmond, Virginia. The return reported taxable net income of $40,145.32 and tax liability of $1,753.13. Such $1,753.13 was paid to said collector on dates and in installments as follows:

March 19, 1932	$438.28
June 16, 1932	438.28
September 15, 1932	438.28
December 17, 1932	438.29
Total	$1,753.13

3. In reporting net income in the aforesaid return for 1931 plaintiff deducted, among other losses, a loss of $8,750 sustained on the purchase on June 29, 1931, of 50 shares of the capital stock of the Norfolk National Bank of Commerce and Trusts for $15,000 and the sale on June 30, 1931, of such 50 shares for $6,250. Also, among other contributions, plaintiff deducted a payment of $500 to the Norfolk-Portsmouth Advertising Board. These two deductions were disallowed by an internal revenue agent, which disallowance was sustained in full by the Commissioner of Internal Revenue, as

was the addition to income of overlooked dividends amounting to $3,265. After consideration and denial of plaintiff's protest regarding the said disallowance, deficiency tax of $1,620.53 was duly assessed and, together with $193.55 interest thereon, was paid on March 24, 1934.

4. On August 29, 1935, plaintiff filed a claim for refund of the entire deficiency tax of $1,620.53, basing such claim, however, only upon the disallowance of the deduction of the $8,750 loss on the stock of the Norfolk National Bank of Commerce and Trusts. Formal notice of the disallowance of such claim was mailed to plaintiff under date of January 14, 1936. This suit was filed on April 18, 1936, and seeks refund of $1,207.15 of the said deficiency tax, plus $144.17 of the interest paid thereon, with interest according to law on the total of $1,351.32.

5. At all times material herein the plaintiff was a prominent man of affairs in Norfolk, Virginia, being financially interested in several corporations in and near that city, including banks. His main interests, however, were centered in publishing the aforesaid Ledger-Dispatch newspaper. Associated with him in this enterprise in an executive capacity was P. S. Huber, a young man in whom the plaintiff took an interest.

6. In December 1928 it was suggested to Huber by the plaintiff that he purchase some stock of the Norfolk National Bank of Commerce and Trusts as it appeared to be an investment that ultimately would be profitable to Huber. Realizing that Huber was a man of limited means who could not afford to go into an enterprise in which he would lose money, the plaintiff made a proposition to him in a letter, as follows:

NORFOLK, VIRGINIA,
December 1, 1928.

Mr. P. S. HUBER,
Norfolk, Virginia.

Dear Sir: Referring to our recent conversation regarding the acquisition by you of stock of the Norfolk National Bank of Commerce and Trusts, as you know, I am greatly interested in the development of the bank and in your welfare also, and as I consider the pur-

chase of the stock of this bank a good investment for you and one that may result in bringing you into closer contact with one of the leading business institutions of this city, I will agree to purchase from you at any time upon reasonable notice up to 50 shares of this stock at a price of $300.00 per share.

Yours very truly,

(Signed) S. L. SLOVER.

7. The market price of this stock in December 1928 was about $300.00 per share. Because of the plaintiff's agreement to purchase, Huber borrowed the necessary money to purchase 50 shares of the stock, using it as collateral for the loan. By July 1931 the market value of the stock had declined to about $125.00 per share and Huber was experiencing difficulty in maintaining the stock as collateral for the loan upon which he was still making payments. On June 29, 1931, he called upon the plaintiff to make good his agreement to purchase, which the plaintiff did by purchasing the 50 shares from him at $300.00 per share. On the following day, June 30, 1931, the plaintiff sold the same stock for $125.00 per share. The resulting loss of $8,750.00 was claimed as a deduction by the plaintiff.

8. The plaintiff did not purchase within thirty days prior or subsequent to the date of the aforesaid sale any stock in the Norfolk National Bank of Commerce and Trusts other than the stock purchased from the said Huber.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court.

The plaintiff seeks a deduction for 1931 of a loss incurred in connection with the purchase of fifty (50) shares of stock of the Norfolk National Bank of Commerce and Trusts.

Section 23 (e) of the Revenue Act of 1928 (45 Stat. 791) permits a deduction of losses—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business.

The plaintiff was the chairman of the board of the Norfolk Ledger-Dispatch, an evening newspaper. He was also

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a stockholder in the Norfolk National Bank of Commerce and Trusts. Associated with him in the newspaper business was P. S. Huber, a younger man, in whose welfare the plaintiff was interested. Plaintiff suggested to Huber in 1928 that he purchase some of the stock of the Norfolk National Bank of Commerce and Trusts and, in order to induce him to do so and to save him from loss if he did, plaintiff entered into an agreement with him, as set out in his letter of December 1, 1928, which reads as follows:

> Referring to our recent conversation regarding the acquisition by you of stock of the Norfolk National Bank of Commerce and Trusts, as you know, I am greatly interested in the development of the bank and in your welfare also, and as I consider the purchase of the stock of this bank a good investment for you and one that may result in bringing you into closer contact with one of the leading business institutions of this city, I will agree to purchase from you at any time upon reasonable notice up to 50 shares of this stock at a price of $300.00 per share.

Following this Huber bought fifty shares of the stock of this bank at $300.00 a share, borrowing the money in order to do so, and using the stock as collateral for the loan. By July 1931 the market value of the stock had declined to about $125.00 a share, and Huber was being pressed by his creditor for payment of the loan or for additional collateral. He, therefore, found it necessary to call on the plaintiff to fulfill his agreement as set out in his letter of December 1, 1928. In response the plaintiff purchased from him his 50 shares at $300.00 a share, and the next day sold the same stock for $125.00 a share, sustaining thereby a loss of $8,750.00.

It is clear that this is not a loss incurred in the plaintiff's trade or business; in fact, plaintiff in his brief makes no such claim.

It also seems clear that the loss sustained was not one in a "transaction entered into for profit." Plaintiff had no opportunity of realizing a profit from the transaction. It could result in a loss but not in a profit. The plaintiff entered into the engagement not for profit, but in order to

promote the welfare of a young man in whom he was interested. *Goldsborough* v. *Burnet*, 46 F. (2d) 432.

The plaintiff is not entitled to recover and his petition will therefore be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

BOWLES LUNCH, INC., v. THE UNITED STATES

[No. 43486. Decided June 3, 1940]

On the Proofs

Income tax; loss on property reacquired under mortgage.—Where plaintiff sold a piece of real estate in 1928 for a certain consideration a part of which was secured by a mortgage on the property, and where in 1931 plaintiff repossessed the property, acquiring an equity therein less than the amount due on the mortgage plus accrued interest, it is held that plaintiff, under Section 23 (f) of the Revenue Act of 1928, and the treasury regulations, is entitled to a deduction in its income tax return for 1931 of a loss measured by the difference between the face value of the notes taken in payment for the property and the agreed market value of the equity in the property when reacquired.

Same; bad debt.—Where in the reconveyance to taxpayer in 1931 of property sold in 1928, part of the consideration of which sale was a mortgage, and where as a consideration for said reconveyance parties personally liable on such mortgage were released from such liability, it is held that in its income tax return for 1931 plaintiff cannot claim deduction for a bad debt under Section 23 (j) of the Revenue Act of 1928, since when the property was reconveyed to the mortgagee the liability was extinguished and the debt was wiped out.

Same; computation of loss.—Where in computing its profit when it sold property taxpayer treated notes secured by mortgage as worth their face value, it is held that in computing its loss on reacquisition of the property taxpayer was entitled to use the same value.

Same; legislative sanction to regulations.—Where provisions of the Revenue Acts succeeding the Revenue Act of 1928 with relation to the deduction of losses are substantially the same as the provision of the Revenue Act of 1928, under which the regulation relied upon by the taxpayer was promulgated, it is held that legislative sanction has been presumptively given to the regulation.

Same; improper characterization of loss.—Where taxpayer made claim for refund under the heading of "Loss On Acquisition of Real Estate," and under this heading computed its loss by deducting from the amount of its mortgage what it claimed was the value of the property acquired, the Government was fully advised as to the basis of the taxpayer's claim and could not take advantage of the fact that taxpayer improperly characterized it as a "loss on partial bad debt."

The Reporter's statement of the case:

Mr. John C. Boland for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of facts entered into between the parties.

1. Plaintiff is now, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of Massachusetts, engaged primarily in the business of operating quick lunch rooms, but also in buying, leasing and selling improved real property and equipment in and upon and with which its several places of business were operated. One such place of business and property was and is located in Syracuse, New York, in a building known as the Lansing Building.

2. On March 15, 1932, plaintiff filed with the Collector of Internal Revenue for the District of Massachusetts its federal corporation income tax return for the calendar year 1931, made upon the accrual basis, reporting a total gross income of $262,502.03, deductions therefrom amounting to $155,139.92, a net taxable income of $107,362.11, and a tax thereon of $12,883.45. This tax was timely assessed and paid in quarterly installments during 1932.

Later the Commissioner assessed against plaintiff additional taxes of $706.50, which was paid to the Collector of Internal Revenue on April 15, 1933.

3. On June 12, 1934, plaintiff filed with the Collector of Internal Revenue its formal claim for refund of $10,369.09 of its 1931 tax and $45.93 of interest, stating as grounds,

among other things, a claimed deduction of $101,014.32 resulting from repossession of certain mortgaged property, to which particular reference will hereinafter be made.

On July 5, 1934, plaintiff filed a further formal claim for refund for the year 1931, claiming deductions not here in controversy. This claim resulted in a refund of $147.43 of tax and $9.58 of interest paid thereon, together with accrued interest of $15.38. A Certificate of Overassessment in the same amount was delivered to the plaintiff together with a Treasury check dated December 15, 1934, in the amount of $172.39.

In arriving at the above overassessment of $147.43, the Commissioner of Internal Revenue determined the net income of the plaintiff for 1931 to be $112,021.04, with a resulting net tax liability of $13,442.52.

By registered letter dated December 27, 1934, plaintiff was advised of the disallowance and rejection of its refund claim filed June 12, 1934.

4. The facts relating to the claimed deduction of $101,014.32 mentioned in finding 3 above are as follows:

Plaintiff acquired from Henry L. Bowles and wife a certain piece of property known as the Lansing Building by deed dated December 22, 1920, at a cost of $380,200.

By deed dated March 2, 1928, plaintiff sold said building and the lunch room equipment contained therein to Robert Bersani for a total consideration of $425,000. The plaintiff reported a profit of $41,161.18 on this transaction in its income tax return for 1928, computed by deducting the cost from the selling price of $425,000.

5. Said sale was made subject to a first mortgage of $140,000, which the grantee assumed and agreed to pay. The grantee then secured from the holder of the first mortgage an additional loan of $50,000, secured by a second mortgage on the premises, and paid the entire proceeds thereof to the plaintiff to apply upon the purchase price of said premises. The said first and second mortgages, both being held by the same party, to all intents and purposes then became a first mortgage upon the premises, and hereinafter sometimes are referred to as the first mortgage.

The said grantee then gave the plaintiff a third mortgage (hereinafter sometimes referred to as the second mortgage) of $185,000, and paid the plaintiff an additional $50,000 in cash. The said $185,000 mortgage was payable as follows: $2,500 on September 15, 1928, $2,500 semi-annually thereafter until March 15, 1930, $5,000 on March 15, 1930, and $5,000 semi-annually thereafter until March 15, 1945, when the entire balance of said mortgage would become due and payable, with interest on said principal sum or any unpaid part thereof at the rate of 5½ percent per annum from March 15, 1928, payable semi-annually thereafter.

6. Said Bersani sold and conveyed an undivided one-half interest in and to said premises to N. Edward Rosenberg and Leah Rosenberg, his wife, as tenants by the entirety, by deed dated October 26, 1928, which recited that the premises were thereby conveyed "subject to the existing leases now on said premises" and also "subject to a first mortgage in the amount of $190,000 held by the First Trust & Deposit Company and a mortgage for $182,500 held by Bowles Lunch, Inc., both of which said mortgages parties of the second part assume and agree to pay."

Title to the undivided one-half interest then remaining in said Bersani was subsequently vested, after several transfers by warranty deeds, all duly recorded, in 115 Salina Corporation, a New York corporation, by warranty deed dated July 7, 1930.

Title to the undivided one-half interest then remaining in the said Rosenbergs was subsequently vested, after several transfers by warranty deeds, all duly recorded, in Ge-Ro Realty Corporation, a New York corporation, by warranty deed dated June 21, 1930. None of the grantees in the deeds subsequent to the Rosenberg deed, dated October 26, 1928, became personally obligated to pay the mortgages above mentioned upon said premises.

7. The said Ge-Ro Realty Corporation and 115 Salina Corporation met the payments upon the plaintiff's mortgage above mentioned until September 15, 1930, when the payment of principal then due was defaulted.

8. Upon threat of foreclosure, 115 Salina Corporation conveyed title to its one-half interest in said premises to

Caleb W. Bowles, plaintiff's nominee, by deed dated February 19, 1931. This latter deed recited that the premises were thereby conveyed, "Subject to mortgages, taxes and all existing leases. The party of the first part reserves the right to collect, receive and retain the February 1931 rents. This conveyance is made further subject to an unpaid oil bill of not to exceed $200, which bill the second party assumes and agrees to pay."

Ge-Ro Realty Corporation also conveyed its undivided one-half interest in said premises to Caleb W. Bowles, plaintiff's nominee, by warranty deed dated February 19, 1931. This latter deed recited that the premises were thereby conveyed "subject to mortgages, taxes and all existing leases."

No consideration was passed for the last two mentioned deeds except that the parties personally liable on plaintiff's mortgage were released from their obligation thereon.

The plaintiff during 1931 became, ever since has been, and still is, the owner of said premises.

9. The said Robert Bersani and Mary Bersani, his wife, and the said N. Edward Rosenberg and Leah Rosenberg, his wife, were all insolvent and execution proof at the time of these transactions in 1931 and they all subsequently filed petitions in and were discharged of their debts in bankruptcy. No dividend was paid in any of said four bankruptcy cases.

10. The unpaid balance of the principal of plaintiff's second mortgage was $172,500 and accrued interest thereon was $4,058.53 when said property was repossessed by plaintiff. The fair market value of the property at the time of its reacquisition in 1931 was $300,000.

Plaintiff reacquired title to said property subject to prior encumbrances and costs of acquisition aggregating $205,414.32 as follows:

First mortgage	$190,000.00
Accrued interest thereon	1,561.65
City, County and State taxes	10,802.32
Reacquisition costs	3,050.35
	$205,414.32

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11. As of December 31, 1930, the ledger of Bowles Lunch, Inc., included the second mortgage of $172,500 in an account called "Mortgage Receivable—Second Mortgage," with a debit balance of $172,500. The ledger also included as of December 31, 1930, in an account called "Accrued Interest Receivable" a debit of $2,767.19, which represented accrued interest receivable on the second mortgage of $172,500 for the period September 15, 1930, to December 31, 1930, inclusive.

During 1931 the amount of $2,767.19 was charged to profit and loss and deducted in plaintiff's 1931 Federal income tax return. This deduction was disallowed by the Treasury Department. The accrued interest receivable on the second mortgage of $172,500 for the period January 1 to February 19, 1931, in the amount of $1,291.34 was included by the Commissioner as part of the plaintiff's net income of $112,021.04 for 1931.

Under date of May 31, 1931, an entry was made on the journal of Bowles Lunch, Inc., as follows:

Lansing Building—Real Estate	$172, 500.00	
Mortgages Receivable, 2nd Mtg		$172, 500.00

The credit entry was posted to the account in which the $172,500.00 mortgage was recorded, thus closing the account, which was balanced and ruled off. The debit entry was posted to a new account entitled "Lansing Building—Real Estate."

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On March 2, 1928, the plaintiff, a Massachusetts corporation, sold a piece of real estate and certain other property for a certain consideration, a part of which was secured by a mortgage on the property. Later, in 1931, the plaintiff repossessed the property. The question presented is whether or not it is entitled to a deduction of a loss or of a bad debt arising out of the transaction. The essential facts are as follows:

The plaintiff on the date stated sold to Robert Bersani a piece of real estate known as the Lansing Building and

certain lunch room equipment contained therein for a total consideration of $425,000, (upon which transaction it reported a profit in its income tax return for 1928 of $41,-161.18). This consideration was paid by the assumption of a first mortgage on the property of $140,000, by the payment of $100,000 in cash, and by the execution of a third mortgage of $185,000. Of the $100,000 paid in cash, $50,000 was secured from the first mortgagee on a second mortgage on the premises.

In its income tax return for 1931 plaintiff claimed no deduction on account of this transaction, but on June 12, 1934, it filed a claim for refund of $10,369.09, plus interest of $45.93, on the ground, among others, that it was entitled to a deduction from gross income of $101,014.32 on account of the repossession of this property. This claim was denied and this suit was brought.

The plaintiff claims the deduction either as a bad debt under section 23 (j) of the Revenue Act of 1928 (45 Stat. 791), or as a loss under section 23 (f) of that Act.

It is stipulated that the market value of the property at the time it was repossessed was $300,000. There was then outstanding against it first and second mortgages, the principal of which aggregated $190,000, accrued interest on the first mortgage of $1,561.65, City, County and State taxes of $10,802.32, and it cost plaintiff $3,050.35 to reacquire the property. By its reacquisition, therefore, plaintiff acquired an equity of $94,585.68. It claims as a bad debt the difference between this equity and the amount of the mortgage, plus accrued interest, $176,558.53, or $81,972.85. In the alternative, it claims a loss of this amount.

The stipulation of facts, which is all the evidence in the case, states that each of the conveyances to the plaintiff was made "subject to mortgages, taxes and all existing leases." It also states that "no consideration was passed for the last two mentioned deeds except that the parties personally liable on plaintiff's mortgage were released from their obligation thereon." Since the parties personally liable were released from liability and the property was reconveyed to the mortgagee, the liability was extinguished, the debt was

wiped out. Since there was no longer a debt, the plaintiff is not entitled to a deduction under section 23 (j).

The plaintiff claims a deduction for a partial bad debt under that portion of section 23 (j) which reads as follows:

> And when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part.

This section, however, has in mind a transaction to be completed in the future, and not one already completed. When the plaintiff accepted the property in satisfaction of the debt, the debt was extinguished and, therefore, there can be no deduction for a bad debt.

None of the cases cited by plaintiff in its brief are in point. In none of them was there involved a reconveyance to the mortgagee of the property in satisfaction of the mortgage debt.

If the plaintiff is entitled to a deduction at all in this case, it is entitled to it as a loss under section 23 (f). The plaintiff relies on article 354 of regulations 74. This regulation provides that where property is repossessed in consideration of the cancellation of all or a part of the indebtedness against it, a gain or loss will result—

> * * * measured by the difference between the fair market value of the property and the basis in the hands of the vendor of the obligations of the purchaser (generally, the fair market value thereof which was previously recognized in computing income) which were applied by the vendor to the purchase or bid price of the property.

Under this regulation the plaintiff says that it is entitled to the difference between its mortgage debt and the fair market value of the equity acquired. In computing its profit when it sold the property the plaintiff treated the notes secured by the third mortgage as worth their face value. Under the regulation, in computing its loss on a reacquisition of the property it is entitled to use this same value. If the regulation is valid, the plaintiff is entitled to a deduction of a loss measured by the difference in the face of the unpaid notes and the agreed market value of the equity in the property acquired.

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The provisions of the Revenue Acts succeeding the Revenue Act of 1928 with relation to the deduction of losses are substantially the same as the provision of the Revenue Act of 1928, under which the regulation relied upon was promulgated. Provisions similar to that in the above article appear in regulations 77 under the 1932 Act (article 354), in regulations 86 under the 1934 Act (article 44-4), in regulations 94 under the 1936 Act (article 44-4), and regulations 101 under the 1938 Act (article 44-4). See also T. D. 4832, 1938-2 C. B. 155. Legislative sanction has, therefore, been presumptively given to the regulation.

The regulation has been approved and applied by the Board of Tax Appeals. *Home State Bank* v. *Commissioner*, 15 B. T. A. 121; *Henry Heldt* v. *Commissioner*, 16 B. T. A. 1035.

But it is said the principle of the opinion of the Supreme Court in *Helvering* v. *Midland Insurance Co.*, 300 U. S. 216, is contrary to the regulations. In that case the Supreme Court held that where a mortgagee at a foreclosure sale bids in the property for the principal of the debt, plus interest, he is deemed to have received the interest and is taxable on it, notwithstanding the fact that the value of the property acquired might have been less than the principal and accrued interest. The court saw no difference between a purchase by a mortgagee and a purchase by a stranger. Since the mortgagee would have been taxable on the interest had a stranger bid the amount of the debt plus accrued interest, the court was of opinion that it was likewise taxable if such a bid was made by it.

The Circuit Court of Appeals for the First Circuit, in *Hadley Falls Trust Co.* v. *United States*, 110 F. (2d) 887, saw no inconsistency between this opinion and article 193 of regulations 74, which contains, in part, substantially the same provisions as article 354 above.

The Circuit Court of Appeals for the Eighth Circuit, in *Helvering* v. *Missouri State Life Ins. Co.*, 78 F. (2d) 778, which also dealt with the receipt of interest on a reacquisition of the property, drew a distinction between property reacquired by the mortgagee at a foreclosure sale

and property voluntarily reconveyed to it in consideration of the cancellation of the indebtedness. Where the property was reacquired at a foreclosure sale on a bid by the mortgagee of the principal of the debt and interest, the court held the mortgagee was taxable on the interest; but, on the other hand, it held that where it reacquired the property by voluntary reconveyance in consideration of the cancellation of the debt and interest, it did not receive the interest unless the value of the property was at least equal to the amount of the principal and interest. See *Lucey, Receiver of National Life Insurance Co.* v. *United States*, 78 Ct. Cls. 369, 390, 4 F. Supp. 1000.

We express no opinion as to the deductibility of a loss where property is reacquired at a foreclosure sale. But we are of opinion that where the property is voluntarily reconveyed in consideration of the cancellation of the indebtedness, a loss does occur if the market value of the property is less than the valuation of the mortgage notes used in computing the profit on the original sale. Where property is reacquired at a foreclosure sale the bidding is competitive, and it may be assumed that the bidder was required to bid as high as he did in order to acquire the property. If so, it may be presumed that the market value of the property was not less than the amount bid. *Lucey, Receiver of National Life Insurance Co.* v. *United States*, *supra*, p. 391. On the other hand, we think no such presumption arises where there is a voluntary reconveyance and where it appears that the mortgagor is insolvent. In such case the mortgagee cancels the indebtedness, not necessarily because the property reacquired is worth the amount of the debt, but because he is unable to realize any more. If in such case, as a matter of fact, the market value of the property is less than the amount of his debt, it would seem to follow that a loss results. The regulations, frequently reaffirmed, so provide. We see nothing in *Helvering* v. *Midland Insurance Co. supra*, which conflicts with the regulation relied on, as applied to the facts of this case.

We hold, accordingly, that the plaintiff is entitled to deduct as a loss the difference between the face of the notes

$172,500 plus accrued interest of $4,058.53, and the stipulated fair market value of plaintiff's equity in the property, $94,585.68, or the sum of $81,972.85.

The defendant, however, says that the plaintiff in its claim for refund made claim for a bad debt and not for a loss. The heading under which it makes this claim reads: "Loss on Acquisition of Real Estate." Under this heading it computes its loss by deducting from the amount of the second mortgage what it claims is the value of the property acquired. It is true that it designates this as "loss on partial bad debt," but this is merely an improper designation. The claim as made is a claim properly falling under section 23 (f). The defendant was fully advised as to the basis of plaintiff's claim and, therefore, we think it cannot take advantage of the fact that plaintiff improperly characterized it.

It results that the plaintiff is entitled to recover of the defendant the sum of $9,836.74, with interest as provided by law. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

RIVERS J. MORRELL, JR., v. THE UNITED STATES

[No. 43857. Decided June 3, 1940]

On the Proofs

Pay and allowances; lieutenant U. S. Marine Corps.—Where second lieutenant, U. S. Marine Corps, who contributed to support of dependent mother, received no rental allowance, it is held that on the facts reported plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact in substance as follows:

The plaintiff, Rivers J. Morrell, Jr., was appointed a second lieutenant in the United States Marine Corps on June 3, 1937, and has been a commissioned officer under such appointment on active duty from July 1, 1937, to the date of the filing of the petition in this case. He was on shore duty during the entire period.

Plaintiff's mother, now 58 years of age, is unemployed and has no property or income, except certain shares of stock, of little value, from which she receives a yearly income of only $10.

Plaintiff's father, 57 years of age, was unemployed during the period of the claim, except for employment by his brother for about a year, receiving for his services only board, room and clothing, and owns neither real estate nor personal property, except a few shares of stock of no value. The father, with the above exception, was dependent on plaintiff for support during the entire period of the claim.

Plaintiff's mother kept house for his father during the period of the claim, and plaintiff has lived with them since July 1938. The household expenses averaged approximately $90.00 per month. All of the household expenses, including rent, were paid by the plaintiff, both plaintiff's father and mother being dependent upon him for their living and other expenses. Neither plaintiff's mother nor his father occupied Government quarters at any time.

Plaintiff occupied Government quarters from July 1, 1937, to May 26, 1938, during which time he received no rental allowance. He received rental allowance as an officer of the first pay period at the rate of $40.00 a month for the period from May 26, 1938, to the date of the filing of the petition in this case.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, in part as follows:

> The facts as reported by the Commissioner, which have been substantially adopted by the court, are not disputed by either party. They show that the plaintiff was the chief support of his mother and that he has not received the allowance provided by law. He is, therefore, entitled to judgment.

Entry of judgment was suspended, awaiting filing of stipulation, or report from the General Accounting office, as to amount due in accordance with the above decision.

AUGUST LARSON v. THE UNITED STATES

[No. 44639. Decided June 3, 1940]

On the Proofs

Pay and allowances; officer in U. S. Marine Corps.—Decided upon the authority of *Oliver T. Francis* v. *The United States*, 89 C. Cls. 78.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact in substance as follows:

1. Plaintiff, August Larson, now a Captain in the Marine Corps, was a Second Lieutenant in the Marine Corps, without dependents, during the period from March 21, 1933, to September 24, 1934, serving with the Fourth Regiment, Marine Corps Expeditionary Force in Shanghai, China.

2. While serving in China plaintiff occupied one unfurnished room in a building leased by the Quartermaster. There was no private bath, plaintiff sharing an unheated bathroom with several officers. The room was heated by a fireplace.

3. Plaintiff rented furniture for his room at a monthly rate of approximately fifteen Mexican dollars, or a total for the entire period of approximately $90.50. He purchased an electric heater for the bathroom and electric fixtures for his room at an approximate cost of $10.00.

4. Plaintiff paid about twenty Mexican dollars a month to a servant to clean his room, and the bathroom, and attend to the fireplace, etc. totalling for the entire period approximately $120.67.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM: The facts in this case are similar in all respects to those in the case of *Oliver T. Francis* v. *The United States*, 89 C. Cls. 78. Plaintiff is entitled to recover rental allowance for one room only, not furnished by the defendant, and for all monies expended which in his judgment it was essential to expend.

Judgment is rendered in the sum of $540.37. It is so ordered.

SAMUEL G. TAXIS v. THE UNITED STATES

[No. 44640. Decided June 3, 1940]

On the Proofs

Pay and allowances; captain in U. S. Marine Corps.—Decided upon the authority of *Oliver T. Francis* v. *The United States*, 89 C. Cls. 78.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact in substance as follows:

1. Plaintiff, Samuel G. Taxis, is a Captain in the Marine Corps.

2. During the period from March 1, 1933, to November 9, 1933, he was a Second Lieutenant in the Marine Corps, without dependents and served with the 4th Regiment, Marine Corps Expeditionary Force, at Shanghai, China.

3. While serving in China plaintiff was permitted the use of one room in the Officers' Club. This room was partly furnished, containing a bunk, mattress, pillow, and unfinished locker for clothes. It was heated by a fire-place.

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There was no private bath with this room, plaintiff having to share an unheated bath with several officers. Plaintiff had the use of the dining room and the recreation room where the entire regiment held its official meetings or regimental social engagements.

4. Plaintiff completed the furnishing of the room he occupied in the Club by purchasing furniture at a total cost of 436 Mexican dollars, or approximately $145.67, and also purchased an electric heater and other electrical equipment totalling approximately $13.33.

The court decided that the plaintiff was entitled to recover.

OPINION PER CURIAM: This case is similar in most respects to the case of *Oliver T. Francis*, 89 C. Cls. 78. It differs only in that in the *Francis case* the furniture was rented by the officer and in this case the officer purchased the furniture. The act provides for rental allowances and not purchase allowances. There is no evidence in the case as to what the rental value of the furniture would be and therefore there can be no recovery on this item. Plaintiff is entitled to recover for one room not furnished him, and such other expenses to which he was put and which are proven.

Plaintiff is entitled to recover the sum of $211.43. It is so ordered.

MYER MIDDLEMAN v. THE UNITED STATES

[No. 45033. Decided June 3, 1940]

On Motion to Dismiss

Civil Service employee; statute of limitations.—Where plaintiff, a civil service employee, was notified that on account of reduction in force he would be discharged on October 14, 1931, at which date his pay ceased, and where the instant suit was commenced by the petition filed January 2, 1940, it is held that plaintiff's action is barred by the statute of limitations.

Same.—Right to bring suit, if any existed, accrued when the Government first failed to make payment of plaintiff's salary.

Mr. Frank B. Meseke for the plaintiff.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff in his petition alleges in substance that having passed the examination required by the United States Civil Service Commission, he was duly appointed as "junior accountant" in the Engineer Division of the War Department, and after having served his probationary period his appointment was made absolute and permanent in the classified, competitive United States Civil Service on and after June 26, 1931.

Plaintiff further alleges in substance that while he was lawfully away from his place of employment a notice was served upon him by defendant through its agents advising him that he would be discharged as of the close of business October 14, 1931, on account of reduction in force, and that upon return to the office of his employment he found his duties had been assigned to a new appointee. No allegation is made that plaintiff has since performed any services for the defendant but he alleges that his discharge was unauthorized and unlawful and seeks to recover the amount of the salary which the law provides will be paid to a person performing the duties of the position.

This action was commenced by filing the petition on January 2, 1940, and it will be observed that the plaintiff was discharged October 14, 1931. The defendant filed a motion to dismiss the petition on the ground that plaintiff's action is barred by the statute of limitations and for other reasons.

The plaintiff in his petition makes a number of allegations with reference to the conduct of the Government officials, principally to the effect that they in some way kept him in ignorance of his right of action. Among these allegations is one to the effect that some person or persons in the office of the Civil Service Commission informed him that he had only been suspended and was still employed

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at the office from which the notice purported to discharge him. The plaintiff had been discharged without prejudice which, as we understand, meant that he was still eligible for a position under Civil Service rules, but if anyone informed him that he was still in the employ of the Government they made such statement without any authority and the plaintiff must have known this was not a fact as his pay ceased. No duty devolved upon the agents of the defendant to advise plaintiff with reference to his rights and the matters stated in the petition as an excuse for not bringing the suit earlier are entirely immaterial. If the plaintiff had any right to bring suit for his salary, it accrued when the defendant first failed to make payment of his monthly salary and his action is barred by the statute of limitations.

The motion to dismiss must be sustained without considering the other objections to the petition made by the defendant. It is so ordered.

LITTLETON, *Judge:* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JOSEPH S. HART v. THE UNITED STATES

[No. 45080. Decided June 3, 1940]

On Motion to Dismiss

Jurisdiction of Court of Claims; title to office.—Where plaintiff, who was appointed February 21, 1924, as a physician in the Veterans' Administration, was removed from such office on February 15, 1934, and where plaintiff on February 12, 1940, filed petition with the Court of Claims asking the court to restore him to his former position and to give judgment for the amount of back salary which he would have received if he had performed the duties of the office, said petition is dismissed since the Court of Claims has no jurisdiction to try title to office. *Goodwin* v. *United States*, 76 C. Cls. 218, 233, 234.

Same.—The jurisdiction of the Court of Claims is to give judgment for money demands affecting the United States. *United States* v. *Jones*, 131 U. S. 1, 17, 19.

Opinion of the Court

Same.—The restoration to an office is not within the jurisdiction of the Court of Claims; the function of the court is judicial and not administrative. *Keim* v. *United States*, 177 U. S. 290, 295, 296.

Same; laches.—Delay of five years and more than eleven months in filing suit constitutes *laches*. *Arant* v. *Lane*, 249 U. S. 367, 372.

Mr. Harold P. Ballf for the plaintiff.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff filed his petition on February 12, 1940, and the material allegations therein show that he was appointed February 21, 1924, as a physician in the San Francisco Regional Office of the Veterans' Administration; that on June 6, 1933, he was placed on "administrative furlough, without pay" at which time he was serving as a physician at a salary of $3,800.00 per annum; that he had had considerable experience in military service prior to his appointment and had creditably and satisfactorily performed required duties in the Veterans' Administration until the time of his furlough; that under Section 5, of Civil Service Rule XII, he had also acquired the right to Veteran preference in the matter of retention in the service during periods of reduction in force for failure of appropriations or lack of work; that he was not accorded this right but that the "administrative furlough" was used to circumvent the Civil Service Rule because he was approaching the retirement age; that he was carried on a furlough status from June 6, 1933, to February 15, 1934 and on the latter date his name was dropped from the roll pursuant to the general policy thereafter adopted of dropping an employee's name from the roll, as surplus, after it had remained thereon for six months without assignment to duty; that vacancies were filled by promoting persons lower in standing than the plaintiff and the vacancies resulting from such promotions filled by persons of lower grades, and that these positions could have been filled by plaintiff; that the action of the

Veterans' Administration was contrary to the Civil Service rules and abrogated the so-called merit system; that plaintiff could only have been removed from his position according to the provisions of Sec. 6 of the Act of August 24, 1912 (37 Stat. 539, 555); that plaintiff on August 5, 1935, made a formal demand on the Medical Directors, Veterans' Administration, to be reinstated in his position and such demand was denied; that following plaintiff's intercession with the Civil Service Commissioner, the Commission refused to take action in the matter; and that plaintiff claims the right to the position of physician in the Veterans' Administration as of February 14, 1934, and claims all the rights and privileges of the position including salary, promotion privileges, seniority and retirement rights. Plaintiff prays the Court to determine his right to the office from that date.

It will be seen from the allegations of the petition that plaintiff was removed from office on February 15, 1934, and someone else placed in the position and that this latter party has been performing the duties and receiving the salary; and that plaintiff asks this court to restore him to his former position and to give judgment for the amount of back salary which he would have received if he had performed the duties of the office.

The jurisdiction of this court is to give judgment for money demands affecting the United States. *United States* v. *Jones*, 131 U. S. 1, 17, 19.

The restoration to an office is not within the jurisdiction of the court. The function of the court is judicial and not administrative. *Keim* v. *United States*, 177 U. S. 290, 295, 296.

The issue presented by the plaintiff is one of title to office. The position held by the plaintiff and from which he was removed is now occupied by another who claims the legal right to the office. The Court of Claims has no jurisdiction to try title to office. In the case of *Goodwin* v. *United States*, 76 C. Cls. 218, 233, 234, it was said:

> It is unnecessary for us to pass on the question of whether the removal was legal or illegal. The sole question for our consideration is, Has the plaintiff a cause of action cognizable within the jurisdiction of this court?

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The first thing to be considered is, Who has the title to the office? If the plaintiff does not have the title to the office, then he is not entitled to the salary.

When the plaintiff was removed another officer was appointed in his place and the office has been filled by another ever since. From the time of the plaintiff's removal and ever since, the salary of the office has been paid to the incumbent of the office. In order for the plaintiff to be entitled to recover the salary of the office, it is necessary first to establish his right to the title to the office. This court has no jurisdiction of an action which has for its purpose the reinstatement of the plaintiff to the office from which he has been removed. *Nicholas* v. *United States*, 55 C. Cls. 188, 192.

In *Arant* v. *United States*, 55 C. Cls. 327, 338, Chief Justice Campbell, after a review of the authorities, said:

"When, however, an attempted removal has been made and the officer sues for the salary, he necessarily puts in issue his right to the office. It was held by this court in *Romero's case*, 24 C. Cls. 331, in an opinion by Chief Justice Richardson, that one claiming a salary must prove his legal title to the office, and that only an officer *de jure* can maintain an action for salary. This ruling has been followed in other cases—*Morey case*, 35 C. Cls. 603; *Jackson case*, 42 C. Cls. 39. But the title to an office which is claimed by two persons cannot be determined in a suit by one of them for salary. The jurisdiction to determine the title is exercised either by *certiorari*, *mandamus*, *quo warranto*, or its statutory substitute, or by some other extraordinary remedy. *In re Sawyer*, 124 U. S. 200, 212. The person in possession of the office and exercising its duties is entitled to a hearing on the question of his right to the compensation provided, and to the office as well, and such a hearing cannot be accorded in an action for salary alone, *or in the Court of Claims at all*. When a wrongful removal is made or attempted, and no one is appointed to the supposed vacancy, the officer who can show the unlawfulness of his removal and that he is entitled to the office, has been allowed to sue for and recover the salary." [Italics ours.]

The petition also shows that although the alleged cause of action arose on February 15, 1934, the date plaintiff was dropped from the roll, he did not file suit in this court until February 12, 1940, a period of five years and more than eleven months.

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This Court and the Supreme Court have repeatedly held that such a long period elapsing before an assertion of a right amounts to *laches* and there can be no recovery. *Arant* v. *Lane*, 249 U. S. 367, 372.

In the above case the court held:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.
>
> Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

For the reasons assigned above, the petition is dismissed. It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

TUPELO OIL & ICE COMPANY TO THE USE OF TUPELO OIL & GIN COMPANY, INC., v. THE UNITED STATES

[No. 17,468, Congressional. Decided June 3, 1940]

On the Proofs

Contract for cotton linters; threat of breach; duress.—It is held by the Court that in the instant case the facts are altogether different from the facts in a large number of so-called cotton linter cases which have heretofore been presented to, and decided by, the court, following the decision in *Farmers & Ginners Cotton Oil Company* v. *United States*, 76 C. Cls. 294.

The Reporter's statement of the case:

Benet, Shand & McGowan for the plaintiff. *Mr. George R. Shields* was on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. W. W. Scott* was on the brief.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. Tupelo Oil & Ice Company, a corporation organized under the laws of the State of Mississippi on August 29, 1899, has been engaged in the manufacture of products derivative from cottonseed since its organization.

On July 10, 1934, the plaintiff changed its corporate name from "Tupelo Oil & Ice Company" to "Tupelo Oil & Gin Company, Inc." With the exception of the change of name as stated above, there has not been any change in the corporate identity of the plaintiff since December 30, 1918. The claim in suit is owned by the plaintiff and neither the claim nor any interest therein has ever been transferred or assigned.

2. On or about September 11, 1918, effective, however, as of August 1, 1918, Tupelo Oil & Ice Company entered into a contract with the DuPont American Industries, Inc., authorized and exclusive contracting agent for the United States for the sale of munition linters, known as "Seller's Contract of Sale No. 3292", by the terms of which it agreed to sell to the United States 600 bales (approximately 270,000 pounds) of linters, all as provided by said contract, a copy of which is attached to the petition herein as Exhibit 7 and made a part hereof by reference.

3. After execution of the contract, plaintiff attempted to produce munition linters but found that due to the increased power needed to operate its mill machinery, over that required to produce a commercial or mattress type of linter, its boiler was unable to withstand the increased steam pressure needed in producing munition linters; consequently, the boiler broke down on or about September

18, 1918. On September 28, 1918, plaintiff sent the following telegram to the United States Food Administrator:

> Boiler plant out of commission. Will be thirty or sixty days before can replace boilers. Ask permission to sell seed to any of our neighbors that can take care of them. Seed are green and absolutely necessary to move them to keep them from spoiling. Wire permission.

On the following day the Food Administrator sent plaintiff the following telegram:

> Answering telegram, permission hereby granted to resell cottonseed mentioned at cost to you.

Pursuant to this authority, the plaintiff sold certain cottonseed and the seed so sold is not included in the crush hereinafter referred to, nor is any claim made therefor.

Plaintiff was unable to obtain another boiler or the necessary steel to repair the boiler until November 15, 1918.

The repairs to the boiler were completed about December 10, 1918; and by this time the defendant had notified the oil mills, including the plaintiff, to discontinue producing munition linters and to cut a commercial or mattress type linter, due to the fact that the Armistice had been signed in the meantime, that the need for munition linters no longer existed, and the reduction in cut from munition to mattress type linters was requested in order to avoid economic waste.

4. Between the period January 1, 1919, and July 31, 1919, plaintiff crushed 2,141 tons of cotton seed which at $6.77 per ton of seed crushed would amount to $14,494.57.

5. Plaintiff received on account of the linters produced from such seed the following amounts:

For linters sold to the United States	$0,000.00
For linters sold to others	9,180.86
Total receipts	9,180.86

By reducing its cut of linters after January 1, 1919, plaintiff realized an additional hull production to the extent of 74.935 tons, which at $13.50 per ton amounts to $1,011.62.

The parties hereby agree on the following as a correct statement of the account between them on the basis of the

Opinion of the Court

foregoing facts to which are to be applied the stipulation filed in Congressional No. 17,341:[1]

Debit Items Against Defendant

2,141 tons of seed @ $6.77 per ton	$14, 494. 57	
Total Debits		$14, 494. 57

Credit Items Allowable to Defendant

Sales to the United States	$00, 000. 00	
Sales to others	9, 180. 86	
Additional hull credit	1, 011. 62	
Total Credits		$10, 192. 48
Balance		$4, 302. 09

6. The plaintiff did not tender any of the linters produced by it during the 1918–1919 season to the defendant. Plaintiff sold all the linters produced by it prior to January 1, 1919, by January 9, 1919, to persons other than the defendant, at prices averaging .0612 cents per pound. Likewise it sold all the linters produced by it after January 1, 1919, by March 31, 1919, to persons other than defendant at prices averaging .0684 cents per pound. These sales were made at the then current market prices.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The petition shows that the case is before this court pursuant to a resolution passed by the Senate of the United States March 3, 1923, which referred to this court a large number of claims known as the cotton linter cases, among which was the claim of the plaintiff for $5,313.71. The claim of the *Farmers & Ginners Cotton Oil Co.* v. *United States* was submitted to the court as a test case and in 76 C. Cls. 294, it was held, following the decision in the case of *Hazelhurst Oil Mill & Fertilizer Co.* v. *United States*, 70 C. Cls. 334, that

[1] The facts stated in the stipulation referred to above are not set out in these findings for the reason that the conclusions of the court as to the law of the case, when applied to the facts agreed upon, make the statement contained in this stipulation immaterial in deciding the case.

the contract of settlement upon which the defendant relied in all of these cases was obtained by duress and was void under the facts in the case then before the court. Since the decision in the *Farmers & Ginners case*, *supra*, a large number of these cotton linter cases have been presented to the court on the same issue and decided, in which the facts supporting the claim of duress in the contract of settlement with the defendant were substantially the same as in the test case, and judgment has been rendered for the plaintiffs accordingly. But in the case now before us, the facts are altogether different. The plaintiff never manufactured any munition linters on account of a failure in its machinery, and consequently did not perform any of its part of the contract. It asked and obtained leave to sell the cotton seed which it had purchased and did so sell a portion thereof. A principal part, or at least a very important part, of the duress in the cases in which the plaintiffs were given judgment was the threat of defendant to refuse to pay for the munition linters which had already been tagged and accepted, which the opinion in the *Hazelhurst case*, *supra*, said was a "course of action for which the Government can not present even the shadow of a legal right" and would have had a disastrous and irremediable effect upon the manufacturer. Nothing of the kind appears in the instant case, for no munition linters had been manufactured. Pursuant to notice given by the defendant after the Armistice had been signed, it made commercial linters.

Defendant urges that there is no showing that plaintiff could at any time have made munition linters, but we think we are justified in presuming that after the defect in its machinery had been remedied the munition linters originally contracted for could have been made. However this may be, we think there is a failure to show duress by reason of the fact that before the contract had been canceled by defendant the plaintiff had failed in its part of the agreement and defendant therefore was entitled to cancel the contract; also by reason that no irreparable damage to plaintiff appears from the facts agreed upon. There being no duress, the settlement signed by plaintiff is conclusive against it.

It follows that plaintiff is not entitled to recover any damages in the case and that its petition must be dismissed,

and the proceedings had herein will be reported to the Senate pursuant to the resolution referring the case to this court. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

E. A. WAILES, RECEIVER OF DELTA OIL COMPANY v. THE UNITED STATES

[No. 17450, Congressional. Decided June 3, 1940]

On the Proofs

Contract for cotton linters; statute of limitations; jurisdiction.—It is held, following the decision in the case of *Farmers Cotton Oil Co.* v. *United States*, 84 C. Cls. 468, 472, that the instant case is barred by the statute of limitations and the court is without jurisdiction to take any action except to certify to Congress the facts in the case.

The Reporter's statement of the case:

Benet, Shand & McGowan for the plaintiff.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. W. W. Scott* was on the brief.

The court made special findings of fact as follows, pursuant to the stipulation of the parties:

1. By agreement of the parties all the facts upon which the case of *Hazelhurst Oil Mill Co.* v. *United States*, 70 C. Cls. 334, was decided are made part of the record herein so far as they are applicable; and it is further stipulated that—

Delta Oil Company is a corporation existing under the laws of the State of Mississippi. During 1918–1919, it was engaged in the manufacture of products derivative from cotton seed.

On February 28, 1940, the Chancery Court of Washington County, Mississippi, appointed E. A. Wailes receiver of Delta Oil Mill, Inc., and ordered that a hearing be set for March

4, 1940, in order that any stockholders or other parties in interest might appear to resist the appointment of the receiver or to have the appointment revoked.

On March 4, 1940, on motion, the court corrected the name of the case to Delta Oil Company, and as no stockholders or other parties in interest appeared to resist the appointment of the receiver, the appointment was adjudged permanent. The stockholders of Delta Oil Company are the owners of the claim in suit. Neither the claim nor any interest therein has ever been transferred or assigned.

2. On or about September 6, 1918, effective, however, as of August 1, 1918, Delta Oil Company entered into a contract with the DuPont American Industries, Inc., authorized and exclusive contracting agent for the United States for the sale of munition linters, known as "Seller's Contract of Sale #3241," by the terms of which it agreed to sell to the United States 3,000 bales (approximately 1,500,000 pounds), of linters, all as provided by said contract, a copy of which is attached to the petition herein as Exhibit 7 and made a part hereof by reference.

3. During the period January 1 to July 31, 1919, Delta Oil Company crushed a total of 7,307 tons of seed which, at $6.77 per ton of seed crushed, would amount to $49,468.39.

4. The Delta Oil Company received on account of the linters produced from such seed the following amounts:

For linters sold to the United States	$21, 147. 33
For linters sold to others	11, 328. 90
Total receipts	32, 476. 23

By reducing its cut of linters after January 1, 1919, Delta Oil Company realized an additional hull production to the extent of 255.745 tons which at $13.50 per ton amounts to $3,452.56.

The following is a correct statement of the account between the parties upon the basis of the foregoing facts and the application of a stipulation in Congressional No. 17,341:

Debit items against defendant

7,307 tons of seed @ $6.77 per ton	$49, 468. 39	
Total debits		$49, 468. 39

Credit items allowable to defendant

Linters sold to United States	$21,147.33	
Linters sold to others	11,328.90	
Additional hull credit	3,452.56	
Total credits		$35,928.79
Balance		13,539.60

The claim of this company is one of those referred to the court by Senate Resolution #448 of March 3, 1923. No petition thereunder was filed by the party in interest, however, until in 1934, when, by leave of court first had on December 10, 1934, and over the objections of the defendant, plaintiff (Delta Oil Company) was allowed to file its petition herein.

The court decided that it was without jurisdiction of the claim other than to find and report the facts, with its opinion, to Congress.

GREEN, *Judge*, delivered the opinion of the court:

This suit is begun under the provisions of a resolution passed by the Senate March 3, 1923, referring a large number of claims named therein to this court. These claims are commonly referred to as the cotton linter cases. A petition was filed in this court December 17, 1934, by the Delta Oil Company. No company by that name is specified in the list of claims set out in the bill. Two companies are specified under the names of "Delta Cotton Oil Company, Gowdy, Mississippi, $18,221.16" and "Delta Cotton Oil Company, Greenville, Mississippi, $25,672.72", and defendant insists that the plaintiff does not come under the provisions of the bill. We have no need, however, to determine this question as the claim upon which this action is founded was not presented to this court by a petition until more than eleven years after the congressional reference was made.

The defendant in its brief calls the attention of the court to the delay in filing the petition and contends that the action is barred by the statute of limitations; and that the court has no jurisdiction to take any action further than to certify to Congress the facts in the case. The same kind of objection

based on similar facts was made in the case of *Farmers Cotton Oil Co.* v. *United States*, 84 C. Cls. 468, 472, and the court there held that the action was barred and that the objection must be sustained.

Following the ruling made in the case cited, the material facts as shown by the findings and the proceedings had herein will be certified to Congress but the court has no jurisdiction to proceed further with the case.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE CHOCTAW NATION v. THE UNITED STATES

[No. K-260. Decided April 1, 1940. Plaintiff's and defendant's motions for new trial overruled October 7, 1940]

On the Proofs

Indian claims; tribal property and funds.—Plaintiff, an Indian tribe or nation, brings suit for an accounting with respect to the disposition of its property and the disbursement of its funds under certain treaties, agreements and acts of Congress, and for interest on certain sums involved therein. With the exception of one claim arising from the reduction of the rate of interest on a trust fund established for the benefit of the plaintiff, it is held that such claims so asserted are not warranted and that the expenditures complained of were disbursed for the benefit of the plaintiff, for lawful purposes, under the provisions of the treaties and agreements between the Choctaw Nation and the United States and under various acts of Congress which were enacted in the exercise of the plenary power of Congress over the property, funds, and affairs of Indian tribes.

Same; treaty provisions.—In purchasing the "Leased District" the Government was concerned with providing for the freedmen, persons of African descent held in slavery by the Choctaws and Chickasaws; and the "trust fund" provided for in the treaty of 1866 was essentially contingent upon the observance of the treaty provisions for adoption of the freedmen within the time stipulated. Said treaty was not complied with either by the Indians or the United States, as held in *United States* v. *The Choctaw Nation*, 38 C. Cls. 558.

Syllabus

Same; assumption of expense by Government.—When the Government assumes the expense involved in the management, control, and disposition of property of an Indian tribe, Congress generally provides for so doing and a liability of this character cannot be inferred where the legislation concerned with the subject matter deals specifically with the details of procedure and makes no mention of such an assumed liability.

Same.—When the agreements in question are interpreted in the light of their purpose due to existing conditions, the assumption by the United States of control of the administration of the affairs of the tribe and the carrying out of the agreement did not impose upon the Government the obligation of paying all the expenses incident thereto.

Same.—The United States Government has not as a general policy borne the expense of the sale or distribution of tribal property.

Same; "proceeds."—"Proceeds" means the amount of money produced less the expenses of sale.

Same.—Congress possesses and has long exercised in many cases the authority to charge Indian tribes with disbursements for their benefit which may be a charge against public funds, for which disbursement the Government has not by treaty or agreement assumed responsibility.

Same; offset of gratuities.—The provision of the act of August 12, 1935, requiring the court to offset sums gratuitously expended for the benefit of the tribe, is a ratification of the disbursements made by the Secretary of the Interior from tribal funds, for proper purposes and for the benefit of the tribe, which may have been in excess of Congressional appropriations.

Same; obligation of Government.—The Atoka and Supplemental agreements did not impose any obligation upon the United States to bear the expense of their administration.

Same; expense of appraisements.—The act of July 1, 1902, ratifying the Supplemental agreement, contained no provision imposing upon the Government the cost of appraising improvements upon the lands of plaintiff; it was impossible to complete the appraisements without appraising the improvements, and since the statute provided for paying for appraisements out of plaintiff's funds, the Secretary of the Interior had implied authority to pay this expense out of plaintiff's funds.

Same; authority of Secretary of the Interior.—Under the decision in the *Creek Nation* case, 78 C. Cls. 474, 490, where it was held that the Curtis Act, which took away from the Indian authorities the control which they formerly exercised over tribal property and funds, and by implication vested the Secretary of the Interior with authority "to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Indians," it is held that funds expended

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for pay of miscellaneous employees and for miscellaneous agents' expense, do not come within the purview of annual appropriations from public funds for the operation of the Interior Department and such funds were properly chargeable against the Indian tribe.

Same.—Such amounts, even if allowable, would be offset by like amounts under the act of August 12, 1935.

Same; expense for roads.—The amount disbursed from plaintiff's funds for roads was not an expense which the Government was obligated to bear in the administration of the Atoka and Supplemental agreements.

Same.—The Secretary of the Interior had implied authority to incur and pay the expenses for investigating tribal warrants and claims, and was given explicit authority by the act of April 26, 1906.

Same.—The amounts disbursed from tribal funds for pay of Indian police, even if allowable, would constitute an offset under the act of 1935.

Same.—Disbursements for premiums for insurance covering plaintiff's Capitol building, while not specifically authorized by Congress, were made under the implied authority of the Atoka and Supplemental agreements, since said disbursements were solely in the interest of plaintiff and for the purpose of conserving and protecting its property.

Same; plenary authority of Congress.—Disbursement from plaintiff's funds for the erection of a monument to a deceased chieftain, authorized by an act of Congress, was not a taking of plaintiff's funds by the Government for its own benefit or for the benefit of another, and Congress possessed plenary authority to direct the use of Indian funds for any purpose which Congress considered to be for the benefit of the Indians.

Same.—The nature of the purpose of expenditure of Indian funds and the extent of the benefit are matters of policy resting solely with Congress.

Same.—Congress had authority to provide for payments to newly enrolled members of the plaintiff tribe in order to equalize, so far as possible, the benefits which the members of the tribe would receive from the Indian lands, and also to make payments covering the expense of such disbursements.

Same.—Where authority existed for disbursements for the benefit of the tribe, and where disbursements, even if allowable, would be offset under the act of 1935, it is held that plaintiff is not entitled to recover for amounts disbursed for (a) medical attention; (b) for investigating coal and asphalt deposits; (c) for expenses of the office of the Supervisor of Mines on plaintiff's lands; (d) for insurance on sanitarium, for hospital employees, and for roads and grounds.

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Same.—Disbursements made in 1911 and 1912 for expenses incident to appraising timber, which was in the interest and for the benefit of plaintiff, and for which the Government had no obligation, but which the Secretary of the Interior had implied authority to make, was also specifically authorized in the act of March 4, 1911.

Same; provisions of Atoka agreement.—The provision of the Atoka agreement with reference to expenses of surveying, platting, and appraising the town lots then located on the reservation, is not applicable to the towns, parts of towns, and town lots provided for in the act of 1908 when considered in connection with other provisions of the Atoka agreement with reference to town sites and lots, the act of May 31, 1900, and the Supplemental Atoka agreement approved July 1, 1902.

Same; just compensation; res judicata.—Where claim is made for interest, not as interest but as a part of just compensation which was not paid on a judgment against the defendant in the case of the *United States* v. *The Choctaw Nation et al.*, 38 C. Cls. 558; 45 C. Cls. 618, affirmed 193 U. S. 115, it is held that said claim made in the instant case for an additional amount measured by interest is an integral part of a claim heretofore adjudicated on its merits by the Court of Claims and the Supreme Court and that it is therefore expressly excluded from the jurisdiction of the Court of Claims in the instant case by Section 1 of the Jurisdictional Act under which the instant suit was brought. *Cherokee Nation* v. *United States*, 82 C. Cls. 467, cited. *United States* v. *Creek Nation*, 295 U. S. 103, distinguished.

Same; Curtis Act.—Payments made to the Choctaw National Treasurer subsequent to the passage of the Curtis Act of June 28, 1892, pursuant to and in satisfaction of treaty obligations, were not amounts paid or intended for disbursements as contemplated by the Curtis Act and were not in violation of Section 19 of the Curtis Act, but were authorized by Congress in various appropriation acts, which acts, even if in conflict with Section 19 of the Curtis Act, were enacted within the plenary power of Congress over the affairs, property, and funds of the Indian tribes for their benefit.

Same.—Section 19 of the Curtis Act related only to moneys intended for disbursements per capita or for the purpose of carrying out agreements or acts of Congress concerning matters over which jurisdiction was taken from the tribal government and vested in the Secretary of the Interior when the authority of such tribal government was restricted, and, as so limited, continued by the Atoka agreement and subsequent acts of Congress.

Same; Choctaw warrants.—Where disbursements were made for the payment of certain Choctaw warrants issued by the Choctaw National Government which, after investigation, were found

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by the Secretary of the Interior to be valid and binding obligations of the Choctaw Nation, and where the United States had assumed no obligation for such payments, it is held that the Secretary of the Interior had implied authority to make said disbursements from plaintiff's funds and that express authority therefor was conferred by the acts of March 3, 1899, and April 26, 1906.

Same; disbursements from trust funds.—Where disbursements, properly authorized to be made from tribal funds, were made from certain interest-bearing trust funds, provided and set up by treaties and acts of Congress, it is held that the acts of Congress under which said disbursements were made were sufficiently specific to authorize such disbursements from said trust funds.

Same.—Congress possessed authority to direct the use of Indian tribal trust funds for any purpose which Congress deemed for the best interest of the tribe even if such use might not be in accordance with provisions of a prior treaty, agreement, or act of Congress.

Same; reduction of interest on tribal trust funds.—Where it was provided in the act of June 22, 1855, that certain sums should be held as a trust fund for the benefit of the Choctaws and that said trust fund should yield an annual interest of not less than five per centum, and where in the appropriation act of March 1, 1907, it was provided that certain sums in said trust fund should thereafter draw interest at three per centum per annum, it is held that the Government by reducing the interest rate specified and agreed to in the treaty of 1855, failed to fulfill its obligation thereunder and thereby received the use of the funds of plaintiff for the benefit of the Government represented by the reduction of interest subsequent to January 1, 1908.

Same; treaty obligations by Government.—The Government cannot use for the benefit of another, or for its own benefit, the funds of an Indian tribe or the amounts due the tribe by the Government under an obligation solemnly assumed; it has been uniformly held that where the Government assumes a treaty obligation to make a definite payment it must do so.

Same; interest on disallowed claims.—Where plaintiff is not entitled under the decision of the court to recover on any or all of the items making up its total claim, it is held that plaintiff is, as a matter of course, not entitled to recover interest thereon.

Same; contract obligation; interest as just compensation.—Where plaintiff's right to recover grows out of a contract obligation of the Government and results from the Government's failure to fulfill its obligation, no additional amount measured by interest is allowable as a part of just compensation for a taking of property under the Fifth Amendment.

Same; act of August 12, 1935, constitutional.—Plaintiff had no vested right to sue the United States, and the act of August 12, 1935, authorizing the defendant to plead gratuities as offsets was simply the exercise by Congress of its authority to charge plaintiff with such sums expended for its benefit as would constitute a charge on public funds, and said act is not unconstitutional, as Congress could at any time modify the remedy given.

Same; offsets under 1935 act.—Under the act of August 12, 1935, only those expenditures made gratuitously and without obligation by the Government for the benefit of plaintiff subsequent to the treaty dated June 22, 1855, which is the earliest treaty under which any claims are asserted by plaintiff, and those expenditures made after subsequent treaties and agreements under which other claims are asserted by plaintiff, constitute proper offsets against such claim or claims.

The Reporter's statement of the case:

Mr. W. F. Semple and *Mr. Robert M. Rainey* for the plaintiff. *Mr. W. B. Johnson* and *Mr. S. B. Flynn* were on the brief.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant. *Mr. George T. Stormont* was on the brief.

Plaintiff brought this suit for an accounting with respect to its property and funds under certain treaties, agreements, and acts of Congress. In an amended petition, based upon full and complete accounting reports made and filed by the defendant, specific amounts totaling $2,485,806.12 are alleged to have been illegally expended by the defendant from plaintiff's funds contrary to treaties, agreements, and acts of Congress. Included in this total is an item of interest of $63,423.11 which plaintiff alleges was due it, but which was not paid. In addition, specific interest in the amount of $1,703,107.20 to June 30, 1935, is computed and claimed on certain items totaling $1,121,253.29 in the principal claim. Plaintiff therefore asks judgment for principal and interest of $4,188,913.32, together with interest at 5 percent on $1,317,686.38 from various dates of disbursement to date of judgment, and further interest on $1,121,253.29 from June 30, 1935, to date of judgment.

The defendant denies all claims made by plaintiff and insists that the funds of plaintiff, which it alleges were unlawfully expended, were disbursed for the benefit of plaintiff, and for lawful purposes under the provisions of the treaties and agreements with plaintiff and various acts of Congress which were enacted pursuant to the plenary power of Congress over the property, funds, and affairs of Indian tribes. In addition, the defendant interposes a counterclaim for various amounts totaling $3,825,152.26 as offsets against any amount that may be determined to be due plaintiff for gratuitous expenditures appropriated and disbursed from public funds for plaintiff's benefit and without obligation therefor under any treaty or agreement with plaintiff tribe.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. *Balance of $286,142.18 (principal, $79,082.87, and interest of $207,059.31) claimed to be due on Choctaw "Leased District" fund under Art. 3, Treaty of 1866.*—Under Art. 3 of the treaty between the United States and the Choctaw and Chickasaw Indians dated April 28, 1866, and completed by the acceptance of amendments on July 2, 1866, 14 Stat. 769, a cession to the United States of lands known as the "Leased District" was accomplished. As a consideration for the cession, the government agreed to pay $300,000, of which amount the plaintiff tribe was to receive $225,000 under certain conditions and the Chickasaw Nation $75,000. This article further provided that this money would be invested and held in trust by the government at an interest rate of not less than 5 percent until the nations, through their respective legislatures, granted certain rights to the freedmen (former slaves) of the nations, but, in the event that such rights were not granted to the freedmen within two years after the ratification of the treaty, then such sum would cease to be held in trust for the nations and thereafter would be held for the use and benefit of the freedmen. Neither tribe granted the rights mentioned to the freedmen within the period specified.

Under Art. 46 of the treaty it was stipulated that out of the $225,000 to be paid to the Choctaw Nation for said cession on the conditions mentioned, the amount of $150,000

be advanced and paid to the Choctaws and $50,000 advanced and paid to the Chickasaws, and that "the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five percent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, * * *." By the act of July 26, 1866, Congress appropriated the amount of $150,000 pursuant to the provisions of Art. 46 of the treaty, 14 Stat. 255, 259, which amount was thereupon paid to the Choctaw Nation.

Plaintiff did not adopt its freedmen until May 21, 1883. Payments were made by defendant to plaintiff on account of obligations arising under Arts. 3 and 46 of the treaty of 1866, as follows:

Fiscal year		
1867	Cash payment to Choctaw Treasurer under Art. 46, Treaty of 1866	$150,000.00
1868	Cash payment to Choctaw Treasurer	11,250.00
1870	Cash payment to Choctaw Treasurer	11,250.00
1883	Expended pursuant to Act of May 7, 1882 (22 Stat. 73), for education of freedmen	7,500.00
1886	Placed in General Trust Fund of Choctaw Nation pursuant to Act of March 3, 1885 (23 Stat. 362, 366)	52,125.00
	Total	231,125.00

The sum of $7,500 shown in the foregoing statement to have been expended for the education of the freedmen was refunded to plaintiff.

2. *Expenses, sale of unallotted lands, $230,074.66 claimed.*—During the fiscal years 1909 to 1912, inclusive, the defendant, through the Secretary of the Interior, disbursed a total of $15,953.96 from plaintiff's funds to cover the expenses of sale of plaintiff's lands. Art. 14 of the "Atoka agreement," dated April 23, 1897 (30 Stat. 495), provided for the sale of these lands. No specific congressional appropriation was made for these expenditures.

During the fiscal years 1913 and 1914 the defendant, through the Secretary of the Interior, made disbursements from plaintiff's funds for the purposes above mentioned pur-

suant to congressional appropriation and authority as follows:

Fiscal year	Amount authorized	Amount disbursed
1913	$25,000.00 Act of Aug. 24, 1912 (37 Stat. 518, 531).	$18,049.70
1914	$37,500.00 Act of June 30, 1913 (38 Stat. 77, 96).	28,519.53

During the fiscal years 1915 to 1929, inclusive, the defendant, through the Secretary of the Interior, made disbursements totaling $154,484.27 from plaintiff's funds to cover expenses incident to the sale of plaintiff's unallotted lands, segregated coal and asphalt lands, and coal and asphalt deposits, and $14,591.24 covering expenses incident to the collection of rents of unallotted lands and tribal buildings, of which amounts the sum of $8,424.47 was in excess of specific congressional appropriations, but was for the benefit of plaintiff tribe, as follows:

Fiscal year	Amount authorized	Amount expended sale of unallotted land	Amount expended collection rents	Expended over authorization
1915	$30,000 Act of Aug. 1, 1914 (38 Stat. 582, 599-600).	$25,282.07	$4,777.99	$60.06
1916	$30,000 Act of Mar. 4, 1915 (38 Stat. 1228).	26,815.75	3,498.60	314.35
1917	$26,250 Act of May 18, 1916 (39 Stat. 123, 148).	25,896.41	2,461.33	2,107.74
1918	$26,250 Act of Mar. 2, 1917 (39 Stat. 969, 984).	22,750.09	3,821.04	321.13
1919	$22,500 Act of May 25, 1918 (40 Stat. 561, 581).	23,595.62	32.28	1,127.90
1920	$7,500 Act of June 30, 1919 (41 Stat. 3, 23).	9,700.15		2,200.15
1921	$5,625 Act of Feb. 14, 1920 (41 Stat. 408, 427).	7,032.90		1,407.90
1922	$5,625 Act of March 3, 1921 (41 Stat. 1225, 1242).	1,040.23		
1923	$4,500 Act of May 24, 1922 (42 Stat. 552, 575).	971.23		
1924	$4,500 Act of January 24, 1923 (42 Stat. 1174, 1196).	3,791.11		
1925	$3,750 Act of June 5, 1924 (43 Stat. 390, 398).	2,723.47		
1929	$4,000 Act of March 7, 1928 (45 Stat. 200, 206).	4,885.24		885.24
				8,424.47

Expenses in collecting tribal revenue.—During the fiscal years July 1, 1914, to June 30, 1917, the defendant, through

the Secretary of the Interior, made disbursements for plaintiff's benefit in the total sum of $5,978.24 from the funds in plaintiff's account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," to cover expenses of collecting tribal revenue.

During the fiscal years July 1, 1915, to June 30, 1919, inclusive, the defendant, through the Secretary of the Interior, disbursed for plaintiff's benefit a total of $14,591.24 from the funds in plaintiff's account known as "Indian Moneys, Proceeds of Labor, Choctaw Unallotted Land," to cover expenses in those years incident to the collection of rents of unallotted land and tribal buildings, as follows: 1915, $4,777.99; 1916, $3,498.60; 1917, $2,461.33; 1918, $3,821.04; 1919, $32.28.

The disbursements made for the purposes mentioned in excess of specific congressional authorization are included in the amount of $8,424.47 first mentioned above in this finding. Plaintiff concedes that disbursements made by the defendant from its funds for the expenses incident to collecting cattle tax and tribal revenue prior to 1914 were proper charges against its account.

3. *Expenses of $68,165.03 in alleged excess of appropriation for sale of segregated coal and asphalt lands and collecting tribal revenue.*—During the fiscal years 1904 to 1926, inclusive, the defendant, through the Secretary of the Interior, disbursed a total of $103,223.64 from plaintiff's funds to pay expenses incident to the sale of plaintiff's segregated coal and asphalt lands and coal and asphalt deposits. All the disbursements making up this total to be paid out of plaintiff's funds were made through specific authorizations by Congress.

4. *Education, alleged unauthorized disbursement of $119,294.25.*—In the act of April 26, 1906, 34 Stat. 137, 140, the Secretary of the Interior was directed to assume control and direction of the schools of plaintiff tribe (and other schools of the Five Civilized Tribes), and to expend, from the funds of said tribe, moneys necessary to defray the expenses therefor, but not to exceed in any one year the amount expended for the scholastic year ending June 30, 1905. The amount of money

expended for the schools of plaintiff tribe during the scholastic year 1905 was $125,166.87.

During the scholastic years July 1, 1906, and ending June 30, 1912, the Secretary made disbursements for school purposes from plaintiff's tribal moneys, as follows: 1907, $113,465.94; 1908, $107,889.02; 1909, $107,490.29; 1910, $89,201.55; 1911, $117,407.79; 1912, $119,904.83.

The act of Congress approved August 24, 1912 (37 Stat. 518, 531), among other things, provides as follows:

> *Provided*, That during the fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year, and attorneys for said tribes employed under contract approved by the President, under existing law, for the current fiscal year: *Provided further*, That the Secretary of the Interior is hereby authorized to continue the tribal schools of the Choctaw and Chickasaw Nations for the current fiscal year.

The foregoing provision was contained in each annual appropriation act until the act of May 24, 1922, 42 Stat. 552. During the fiscal years beginning July 1, 1913, and ending June 30, 1922, the Secretary, for the continuance of the plaintiff's schools, made disbursements for the maintenance and operation thereof from plaintiff's funds in the following amounts for each of the years shown:

Fiscal year	Acts	Amount disbursed
1913	Aug. 24, 1912, 37 Stat. 518, 531	$117,020.75
1914	June 30, 1913, 38 Stat. 77, 95	131,290.63
1915	Aug. 1, 1914, 38 Stat. 582, 600	132,533.51
1916	Mar. 4, 1915, 38 Stat. 1228	92,334.93
1917	May 18, 1916, 39 Stat. 123, 148	142,797.48
1918	Mar. 2, 1917, 39 Stat. 969, 985	126,484.69
1919	May 25, 1918, 40 Stat. 561, 580–582	137,877.51
1920	June 30, 1919, 41 Stat. 3, 23	141,818.27
1921	Feb. 14, 1920, 41 Stat. 408, 427–428	118,445.83
1922	Mar. 3, 1921, 41 Stat. 1225, 1242	154,581.92

The act approved May 24, 1922, 42 Stat. 552, 575, among other things, provided:

> That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes, from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: *Provided further*, That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress: *Provided further*, That for the current fiscal year money may be so expended from such tribal funds for equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools under existing law * * *; *And provided further*, That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1923, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes.

Similar provisions were contained in the annual appropriation acts from 1922 to 1928, inclusive. During the fiscal years beginning with July 1, 1922, and ending June 30, 1928, the Secretary of the Interior disbursed from plaintiff's funds for school purposes the following amounts:

Fiscal year	Act	Amount disbursed
1923	May 24, 1922, 42 Stat. 552, 575	$124,863.57
1924	Jan. 24, 1923, 42 Stat. 1174, 1196	125,492.19
1925	June 5, 1924, 43 Stat. 390, 398	133,015.35
1926	Mar. 31, 1925, 43 Stat. 1141, 1148	123,399.29
1927	May 10, 1926, 44 Stat. 453, 460	110,856.90
1928	Jan. 12, 1927, 44 Stat. 934, 948	131,179.19

In the act of March 7, 1928, 45 Stat. 200, 216, it was provided that—

> The Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole Tribes from the tribal funds of those nations, within his discretion and under such rules and

regulations as he may prescribe, and to expend such funds available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes: *Provided*, That there may be expended * * * from the tribal funds of the Choctaw Nation the sum of $135,000, for educational purposes: *Provided further*, That there may be expended from the tribal funds of the Choctaw Nation for purchase of pasture land for Wheelock Academy not to exceed $600.00; and for one-half the cost of repairs to the road between Wheelock Academy and the highway, not to exceed $3,000.

During the year ending June 30, 1929, the Secretary expended from plaintiff's funds for school purposes the amount of $142,028.19. The disbursements made for this purpose during that year exceeded the amount authorized to be expended therefor by the act of March 7, 1928, *supra*, by $6,428.19.

The amounts expended for education in certain years from July 1, 1914, to June 30, 1929, inclusive, exceeded, in certain of those years, the amounts of $125,166.87 and $135,000 mentioned in the acts of April 26, 1906, and March 7, 1928, *supra*, respectively, in the total amount of $119,294.25. The disbursements in each of the years shown making up this excess were made solely for the benefit of plaintiff tribe.

5. *Expense of $58,887.07 of making per capita payments.*—During the fiscal years 1905 to 1909, inclusive, the defendant, through the Secretary of the Interior, made disbursements totaling $40,908.25 for plaintiff's benefit from its funds in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Town Lots," to cover expenses incident to making per capita payments as provided in the Atoka and Supplemental agreements. Disbursements for the purpose of paying these expenses were made without specific congressional direction, other than as may be gathered from the terms of the "Atoka agreement" of April 23, 1897, 30 Stat. 495, and the Supplemental agreement of July 1, 1902, 32 Stat. 641.

During the fiscal year ending June 30, 1912, the defendant, through the Secretary of the Interior, made disbursements totaling $7,645.39 for plaintiff's benefit from plain-

tiff's funds in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc." to cover expenses incident to making per capita payments. These disbursements for the expenses mentioned were made for the benefit of plaintiff without specific congressional direction, other than as may be gathered from the Atoka and the Supplement agreements.

In the act approved March 3, 1911, 36 Stat. 1058, 1070, it was provided that—

> The net receipts from the sales of surplus and unallotted lands and other tribal property belonging to any of the Five Civilized Tribes, after deducting the necessary expense of advertising and sale, may be deposited in national or State banks in the State of Oklahoma in the discretion of the Secretary of the Interior, such depositories to be designated by him under such rules and regulations governing the rate of interest thereon, the time of deposit and withdrawal thereof, and the security therefor, as he may prescribe. The interest accruing on such funds may be used to defray the expense of the per capita payments of such funds.

During the fiscal years 1915 to 1924, inclusive, and the fiscal year 1928, the defendant, through the Secretary of the Interior, made disbursements totaling $61,685.73 for plaintiff's benefit from the funds of plaintiff's account known as "Interest on Choctaw Moneys on Deposit in Banks" to cover the necessary expenses of making per capita payments in those years.

During the fiscal years 1918, 1919, and 1925, the defendant, through the Secretary of the Interior, disbursed a total of $9,749.48 for plaintiff's benefit from funds credited to plaintiff in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Unallotted Land," to cover per capita payment expenses in the amounts of $5,257.09 for 1918, $742.91 for 1919, and $3,749.48 for 1925.

During the fiscal years 1926, 1927, and 1929, the defendant, through the Secretary of the Interior, disbursed a total of $6,816.46 for the benefit of plaintiff from the funds in plaintiff's account known as "Proceeds of Labor, etc., Five Civilized Tribes" (Choctaw) to cover per capita payment expenses of $1,806.75, $1,262.83, and $3,746.88, respectively.

During the fiscal years 1917 to 1919, inclusive, and 1922 to 1924, inclusive, the defendant, through the Secretary of the Interior, disbursed a total of $17,978.82 for plaintiff's benefit from plaintiff's funds to cover the necessary expenses incident to making per capita payments in those years in excess of the amounts specifically authorized by Congress to be disbursed for these purposes, as follows:

Fiscal year	Amount authorized	Amount disbursed	Excess amount
1917	$6,000 Act of May 18, 1916 (39 Stat. 123, 147).	$9,910.06	$3,910.06
1918	$6,000 Act of Mar. 2, 1917 (39 Stat. 969, 984).	10,510.03	4,510.03
1919	$6,000 Act of May 25, 1918 (40 Stat. 561, 580).	13,488.73	7,488.73
1922	$6,000 Act of Mar. 3, 1921 (41 Stat. 1225, 1242).	6,360.00	360.00
1923	$5,250 Act of May 24, 1922 (42 Stat. 552, 575).	6,150.00	900.00
1924	$5,250 Act of Jan. 24, 1923 (42 Stat. 1174, 1196).	6,060.00	810.00
	Total		17,978.82

6. *Expenses of $4,249.07 of appraising improvements.*—During the fiscal years 1904 and 1905 the defendant, through the Secretary of the Interior, disbursed the total of $4,249.07 for plaintiff's benefit from the funds to the credit of plaintiff in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," to cover the necessary expenses of appraising the value of improvements which had been placed upon the lands prior to the segregation thereof by defendant under the authority of section 58 of the act of July 1, 1902, ratifying the Supplemental Atoka agreement of 1902, 32 Stat. 641, 654.

7. *Miscellaneous agents' expenses and pay of miscellaneous employees of $68,420.45.*—During the fiscal years 1905 to 1912, inclusive, the defendant, through the Secretary of the Interior, disbursed $65,899.96 for plaintiff's benefit from plaintiff's funds to cover expenses of miscellaneous employees and miscellaneous agents' expenses, and during the fiscal years 1913 and 1919 there was disbursed for plaintiff's benefit for the same purpose the amount of $2,520.49 from plaintiff's funds.

8. *Expenses for roads.*—Pursuant to the authority of the acts of April 26, 1906 (34 Stat. 137, 146), and March 7,

1928 (45 Stat. 200, 216), the defendant, through the Secretary of the Interior, disbursed $9,202.35 from plaintiff's funds for road purposes within the limits of plaintiff's reservation.

9. *Investigating tribal warrants and claims.*—During the years 1907, 1908, and 1910, the defendant, through the Secretary of the Interior, disbursed for plaintiff's benefit the total sum of $5,516.19 from the funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," in payment of expenses incurred by the defendant in the investigation of tribal warrants and claims pursuant to section 11 of the act of Congress of April 26, 1906, *supra.*

10. *Pay of Indian police.*—During the fiscal years 1910 to 1912, inclusive, the defendant, through the Secretary of the Interior, disbursed for plaintiff's benefit a total of $7,311.49 from funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," in payment of salaries of Indian police, and during the fiscal year 1913 there was likewise disbursed the sum of $1,280.25.

11. *Expenses of sale of tribal buildings.*—During the fiscal years 1909 and 1918 the defendant, through the Secretary of the Interior, disbursed for plaintiff's benefit $251.82 from funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," to cover expenses of sale of plaintiff's tribal buildings pursuant to the acts of April 26, 1906, *supra,* and of April 30, 1908, 35 Stat. 70, 71.

12. *Insurance on Choctaw Capitol building.*—During the fiscal years 1922, 1923, and 1925, the defendant made disbursements for plaintiff's benefit totaling $138 from funds to plaintiff's credit to cover insurance on plaintiff's Capitol building. The disbursements totaling this amount were made without specific congressional appropriation.

13. *Expenses of monument in memory of Chief Green McCurtain.*—During the fiscal year 1914 the defendant disbursed for the benefit of plaintiff from funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," the sum of $500 in payment for a monument in memory of Green McCurtain,

the late deceased chief of the Choctaw Nation, pursuant to the authority for such disbursement contained in the act of June 30, 1913, 38 Stat. 77, 97.

14. *Alleged illegal payments of $137,579 in lieu of allotments.*—During the fiscal years 1915 to 1924, inclusive, the defendant, through the Secretary of the Interior, disbursed a total of $137,579 to newly-enrolled members of plaintiff tribe in lieu of allotments of land pursuant to authority of the act of Congress of August 1, 1914, 38 Stat. 582, 600, which provided in part as follows:

> The Secretary of the Interior is hereby authorized to enroll on the proper respective rolls of the Five Civilized Tribes, as indicated, the person enumerated in Senate Document Numbered Four hundred and seventy-eight, Sixty-third Congress, second session: *Provided*, That when so enrolled there shall be paid to each and every such person out of the funds in the Treasury of the United States to the credit of the respective tribe with which such person is enrolled the following sums in lieu of an allotment of land: * * * to each such person placed on the Choctaw * * * rolls, a sum equal to twice the appraised value of the allotment of such tribe as fixed by the Commission to the Five Civilized Tribes for allotment purposes * * *.

15. *Expenses of making payments to equalize allotments.*—During the fiscal year 1911 the defendant, through the Secretary of the Interior, disbursed for the benefit of plaintiff $201.56 from the funds to the credit of plaintiff to cover the necessary expenses of making payments to equalize allotments. The equalization of allotments was provided for in section 14 of the Supplemental agreement, 32 Stat. 641, 642.

16. *Medical attention.*—During certain fiscal years from 1920 to 1929 the defendant disbursed for the benefit jointly of the Choctaw and Chickasaw nations the sum of $1,089.60 from the funds in a joint account to the credit of these tribes known as "Indian Moneys, Proceeds of Labor, Choctaw-Chickasaw Hospital." These disbursements were made for the support of a hospital for the Indians and without specific congressional authority or appropriation.

17. *Alleged illegal disbursements of $38,416.27 for expenses of investigating coal and asphalt deposits.*—The act

of June 21, 1906, 34 Stat. 325, 346, authorized the Secretary of the Interior to make an investigation of the character, extent, and value of the coal deposits in and under the segregated coal lands of the Choctaw and Chickasaw nations, and for that purpose the Secretary of the Interior was authorized to expend from the funds of the Choctaw and Chickasaw nations, to cover the expense of making such investigation, an amount not to exceed $50,000. Pursuant to the provisions of this act the Secretary made disbursements totaling $38,416.27 during the fiscal years 1908 to 1910, inclusive, and the fiscal years 1912 to 1914, inclusive, for the benefit of plaintiff from the funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc," to cover the expenses of such investigation.

18. *Expenses of office of the supervisor of mines.*—During the fiscal years 1908 to 1911, inclusive, the Secretary of the Interior made disbursements for the benefit of plaintiff totaling $5,439.44 from the funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," to cover expenses of the "Office of Supervisor of Mines," on plaintiff's lands.

19. *Alleged illegal disbursement of $12,117.72 on Choctaw and Chickasaw Sanitarium.*—During the fiscal years 1916, 1918, 1920, and 1926 the Secretary of the Interior made disbursements totaling $12,117.72 for the benefit of plaintiff from plaintiff's funds, other than interest-bearing trust funds, to cover insurance maintained on the Choctaw and Chickasaw Sanitarium for roads and grounds at the sanitarium and for the payment of miscellaneous employees thereat.

The disbursement made for roads and grounds in the amount of $3,633.79 was specifically authorized from plaintiff's funds for that purpose by act of March 2, 1917, 39 Stat. 969, 986. The amount of $8,186.68 was disbursed during the fiscal years 1916, 1920, and 1926 to cover insurance on the Choctaw and Chickasaw Sanitarium. During the fiscal year 1916 there was disbursed $297.25 for pay of miscellaneous employees at the sanitarium. The last two amounts were not specifically appropriated by Congress.

20. *Alleged illegal expenses of $22,499.33 for appraising timber.*—During the fiscal years 1911 and 1912 the Secretary of the Interior made disbursements for the benefit of plaintiff, and with congressional authority, of a total of $22,499.33 from the funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Royalties, Grazing, etc.," to cover expenses incident to appraising timber on plaintiff's reservation (Deficiency Appropriation Act of March 4, 1911, 36 Stat. 1289, 1309).

21. *Disbursements alleged to be illegal under Atoka agreement for expenses of sale of certain town lots.*—During the fiscal years 1908 to 1912, inclusive, the Secretary of the Interior made disbursements pursuant to the authority therefor contained in the act of May 29, 1908, 35 Stat. 444, 446, in the total amount of $15,457.32 from the funds to plaintiff's credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Town Lots" to cover expenses incident to the sale of certain town lots specified in such act.

22. *Claimed interest of $147,491.36 as part of just compensation on judgment, and $10,546.69 additional as its portion of principal.*—Sections 36 to 40, inclusive, of the Supplemental agreement between the defendant and the Choctaw and Chickasaw Nations of March 21, 1902, 32 Stat. 641, 649, 650, stipulated in part that jurisdiction be conferred on this court to determine the rights of Chickasaw freedmen in the lands of the Choctaw and Chickasaw Nations, "and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said

freedmen: * * *." Pursuant to this agreement and the act of Congress ratifying the same, a cause of action was presented to this court to which plaintiff was a party placing in issue the question authorized to be determined and adjudicated.

Thereafter, on April 27, 1903, this court (38 C. Cls. 558) entered a decree in favor of the Choctaw and Chickasaw Nations with leave to them to apply for an additional decree setting forth the amount to be allowed on an accounting showing the amount due under the terms of the agreement and the act of Congress. On February 28, 1904, the decree of 1903 of this court, which did not fix and determine the amount due, was affirmed by the Supreme Court (193 U. S. 115). On January 24, 1910, this court entered an additional decree in which the amount of recovery to which the Choctaw and Chickasaw Nations were entitled was fixed and determined at $606,936.08. On June 25, 1910, Congress in an act of that date, 36 Stat. 774, 807, appropriated the amount determined by this court to be due for the value of allotments made to said freedmen and three-fourths thereof, the portion to which plaintiff was entitled, was placed to the credit of plaintiff and the amount was thereafter distributed per capita. Plaintiff claims that interest on $147,491.36 at 5 percent per annum on its share of this judgment should have been paid from the date of the decree of this court to June 25, 1910. Plaintiff also claims that the aforementioned judgment should have been credited and disbursed on the basis of the actual population of both tribes instead of on the basis of three-fourths and one-fourth, and for that reason it was underpaid $10,546.69 of principal.

23. *Money paid to Choctaw National Treasurer subsequent to passage of the Curtis Act of June 28, 1898, 30 Stat. 495, which act embodied the Atoka Agreement of April 23, 1897.*—Plaintiff seeks under this heading to recover $517,366.52 on the theory that payments totaling that amount to the Choctaw National Treasurer subsequent to the Curtis Act were made in violation of section 19 of that act (30 Stat. 502). During each of the fiscal years 1899 to 1906 payments were made by the defendant through the Secretary of the Interior

to the Choctaw National Treasurer in fulfillment of obligations under Art. 2 of the treaty of 1805 (7 Stat. 98), Arts. 6 and 13 of the treaty of 1820 (7 Stat. 210), Arts. 2 and 9 of the treaty of 1825 (7 Stat. 234), Arts. 19 and 20 of the treaty of 1830 (7 Stat. 333), Art. 3 of the treaty of 1837 (11 Stat. 573), Art. 13 of the treaty of 1855 (11 Stat. 611), and as authorized by Congress in various acts appropriating moneys for the Indian Department for the fiscal years as shown in the following tabulation:

Fiscal year	Treaty provision	Amount disbursed
1899	1805, Art. II	$3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,850.72
	1830, Art. XX	2,473.64
	1837, Art. III	24,925.70
	1855, Art. 13	19,512.89
1900	1805, Art. II	3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,850.72
	1830, Art. XX	1,733.63
	1837, Art. III	24,198.69
	1855, Art. 13	19,512.89
1901	1805, Art. II	3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,850.72
	1830, Art. XX	3,213.65
	1837, Art. III	21,175.70
	1855, Art. 13	19,512.89
1902	1805, Art. II	3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,985.54
	1830, Art. XX	2,473.64
	1837, Art. III	18,262.84
	1855, Art. 13	19,512.89
1903	1805, Art. II	3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	2,064.40
	1830, Art. XX	2,473.64
	1837, Art. III	17,432.15
	1855, Art. 13	19,512.89
1904	1805, Art. II	3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,985.54
	1830, Art. XX	2,473.64
	1837, Art. III	17,426.80
	1855, Art. 13	19,512.89

Fiscal year	Treaty provision	Amount disbursed
1905	1805, Art. II	$3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,985.54
	1830, Art. XX	2,473.64
	1837, Art. III	17,369.10
	1855, Art. 13	19,512.89
1906	1805, Art. II	3,000.00
	1820, Art. 6	600.00
	1820, Art. 13	600.00
	1825, Art. 2	6,000.00
	1825, Art. 9	320.00
	1830, Art. XIX	1,985.54
	1830, Art. XX	2,473.64
	1837, Art. III	3,178.96
	1855, Art. 13	19,512.89

All the payments above mentioned in this tabulation totaled $419,580.89.

During the fiscal years 1901 and 1902 the Secretary of the Interior paid to the Choctaw National Treasurer a total of $22,337.81 out of plaintiff's funds to its credit in the account known as "Indian Moneys, Proceeds of Labor." During the fiscal years 1905 and 1906 the Secretary of the Interior paid to the Choctaw National Treasurer a total of $49,788.55 out of plaintiff's funds to its credit in an account known as "Indian Moneys, Proceeds of Labor, Choctaw Right-of-Way."

24. *Alleged illegal disbursements of $46,866.45 for Choctaw warrants.*—In the years 1900 to 1924, inclusive, the defendant, through the Secretary of the Interior, disbursed from plaintiff's non-interest-bearing funds a total of $46,866.45 as shown in para. XI of the second amended petition. The disbursements totaling this amount were made for the payment of certain Choctaw warrants issued by the Choctaw national government which, after investigation, were found by the Secretary to be valid and to be for valid and binding obligations on the nation. Most of them were for obligations incurred by the nation prior to 1900. Plaintiff has not shown when the expenses making up this amount were incurred for which Choctaw warrants were issued and paid. Of the total disbursements the amount of $45,116.38 was disbursed during the fiscal years 1910 to 1912, inclusive, and the

remainder of $1,750.07 was disbursed during the fiscal years 1913 to 1928, inclusive.

25. *Alleged illegal disbursements of trust funds.*—The Secretary of Interior disbursed the principal of $978,787.31 of the four interest-bearing trust funds of plaintiff as follows:

(a) "Choctaw School Fund," an interest-bearing trust fund which was created by the purchase of bonds during the Eighteen Forties from the annuities of the treaties f 1820, 1825, and 1830; affirmed and continued in trust by Article 13 of the treaty of June 22, 1855; the bonds were liquidated and the proceeds of $49,472.70 were held in trust under the provisions of the act of April 1, 1880 (21 Stat. 70); continued in trust by the Curtis Act; disbursed by the Secretary of the Interior during the year 1917 in making per capita payments.

(b) "Choctaw Orphan Fund," an interest-bearing trust fund which was created from the proceeds of the sale of orphan reservations during 1884 and 1900, and from the amounts appropriated by the acts of Congress during the years 1890 and 1893, all of which sums aggregated $39,710.67, which amount was held in trust under the provisions of the act of April 1, 1880 (21 Stat. 70); continued in trust by the Curtis Act; disbursed by the Secretary of the Interior during the year 1917 in making per capita payments.

(c) "Choctaw General Fund," an interest-bearing trust which was created by the purchase of bonds under the provisions of Article 3 of the treaty of January 17, 1837 (11 Stat. 573); reaffirmed and continued in trust under the provisions of Article 13 of the treaty of June 22, 1855; the bonds were liquidated and the proceeds of $499,346.00 were held in trust under the provisions of the act of April 1, 1880 (21 Stat. 70); continued in trust by the Curtis Act.

(d) "Choctaw 3% Fund," an interest-bearing trust fund which was created under the provisions of Article 13 of the treaty of June 22, 1855, in the original amount of $500,000.00; the residue of $390,257.92 was continued in trust by the Curtis Act.

Disbursements and payments totaling $499,346 were made by the Secretary from the third, or "Choctaw General Fund," to or for the benefit of plaintiff during the years, for the purposes, and in the amounts as follows:

Fiscal year	Purpose of disbursement	Amount
1900	Choctaw warrants	$69,710.08
1901	Choctaw warrants	4,130.78
1901	Payment to heirs of Albert Pike	75,000.00
1902	Choctaw warrants	485.70
1903	Choctaw warrants	292.20
1904	Choctaw warrants	2,530.50
1905	Payment to Mansfield, McMurray, and Cornish	346,364.74
1912	Per capita payments	832.00
	Total	499,346.00

Disbursements totaling $390,257.92 were made by the Secretary from the principal of the "Choctaw 3% Fund," to or for the benefit of plaintiff during the years, for the purposes, and in the amounts as follows:

Fiscal year	Purpose of disbursement	Amount
1912	Expenses, segregated coal and asphalt land	$10,477.98
1913	Expenses, segregated coal and asphalt land	15,086.77
1913	Per capita payments	21,344.99
1914	Per capita payments	12,251.65
1914	Expenses, segregated coal and asphalt land	14,582.48
1915	Expenses, segregated coal and asphalt land	75.00
1915	Equalization payments	3,624.89
1915	Payments in lieu of allotments	25,190.85
1915	Per capita payments	10,670.77
1916	Equalization payments	1,107.15
1916	Payments in lieu of allotments	45,062.14
1916	Per capita payments	2,240.82
1917	Equalization payments	85.24
1917	Choctaw warrants	4,305.40
1917	Payments in lieu of allotments	35,717.67
1917	Per capita payments	186,486.12
1918	Payments in lieu of allotments	1,894.59
1922	Per capita payments	53.41
	Total	390,257.92

The circumstances under which, and the authority for the aforementioned disbursements from the principal of the trust funds are as follows: (None of the amounts hereinafter mentioned, except in (e), is included in any of the preceding findings.)

(a) In the act of March 3, 1899, 30 Stat. 1074, 1099, Congress authorized the Secretary of the Interior to pay "from the funds in the Treasury belonging to the Choctaw Nation of Indians" outstanding Choctaw warrants not exceeding in amount $75,000. By a further act of April 28, 1904, 33 Stat. 1664, the Secretary was authorized and directed to pay

"from the funds in the Treasury belonging to the Choctaw Nation of Indians" two Choctaw warrants for $1,250 each and issued to James M. Shackelford. Pursuant to the authority of these acts, the Secretary disbursed from an interest-bearing fund to the credit of plaintiff in the account known as "Choctaw General Fund" the amount of $77,149.26 during the fiscal years 1900 to 1904, inclusive, in payment of the warrants described in the acts mentioned.

(b) The act of March 3, 1901, 31 Stat. 1058, 1078, authorized the Secretary to pay the sum of $75,000 to the heirs of Albert Pike, deceased, "out of any funds in the Treasury of the United States belonging to the Choctaw Nation." Pursuant to this authority, the Secretary of the Interior paid this sum to the persons mentioned from plaintiff's funds to its credit in the interest-bearing account known as "Choctaw General Fund."

(c) The act of March 3, 1903, 32 Stat. 982, 995, directed the Treasurer of the United States to pay the sum of $346,364.74 to Mansfield, McMurray, and Cornish, attorneys, "out of any funds in the Treasury belonging to said nations," [Choctaw and Chickasaw], the warrant or warrants drawn by the Secretary of the Interior to cover compensation to these attorneys for services rendered by them to plaintiff nation in connection with cases before the Citizenship Court thereto created by Congress. Pursuant to this authority and direction, the defendant paid the amount mentioned to the persons named in 1905 out of plaintiff's interest-bearing funds to its credit in the act known as the "Choctaw General Fund."

(d) By joint resolution of August 22, 1911, 37 Stat. 44, the Secretary of the Interior was authorized, in his discretion, to make a per capita payment to the enrolled members of the plaintiff tribe out of "any moneys belonging to said tribes." In making per capita payments, pursuant to this authority, the Secretary disbursed $832 during the fiscal year 1912 from plaintiff's interest-bearing funds to its credit in an account known as "Choctaw General Fund."

Under authority of this resolution the Secretary of the Interior also made per capita payments from the interest-bearing funds of plaintiff to its credit in an account known

as the "Choctaw 3% Fund" during the fiscal years 1913 to 1916, inclusive, in the total amount of $46,508.23.

Thereafter, the act of May 18, 1916, 39 Stat. 123, 146, 147, authorized the Secretary of the Interior to make per capita payments to plaintiff tribe not to exceed $300 per capita out of "any moneys" belonging to plaintiff. Under the authority of this act per capita disbursements totaling $186,539.53 were made by the Secretary during the fiscal years 1917 and 1922 from plaintiff's interest-bearing fund to its credit in an account known as the "Choctaw 3% Fund."

The act of August 1, 1914, 38 Stat. 582, 600, authorized the Secretary of Interior to enroll certain persons on the proper respective rolls of the Five Civilized Tribes and to pay each person so placed on the Choctaw rolls out of the funds of the Choctaws in the Treasury of the United States a sum equal to twice the appraised value of a Choctaw allotment as fixed by the Dawes Commission to the Five Civilized Tribes for allotment purposes. These payments were authorized to be made to those subsequently enrolled members of the tribe who had not theretofore received allotments. Pursuant to the authority of this act the Secretary of the Interior disbursed $107,865.25 for the purposes mentioned during the fiscal years 1915 to 1918, inclusive, from plaintiff's interest-bearing funds to its credit in the account known as "Choctaw 3% Fund."

The Secretary made a further disbursement of $4,305.40 during the fiscal year 1917 in payment of the Choctaw warrants from plaintiff's interest-bearing funds to its credit in the account known as "Choctaw 3% Fund." This disbursement was made under and pursuant to the authority of the act of April 26, 1906, 34 Stat. 137, 141, which provided, in part, that the Secretary should pay all lawful claims against plaintiff tribe which had been contracted after July 1, 1902, or for which warrants had been regularly issued.

(e) The act of February 19, 1912, 37 Stat. 67, 70, provided for the sale of segregated coal and asphalt lands belonging to the Choctaw and Chickasaw nations. Section 8 of that act authorized and provided that there be "appropriated, out of any moneys in the Treasury not otherwise appropriated belonging to the Choctaw and Chickasaw Tribes of In-

dians" the sum of $50,000 for payment of expenses incident to the classification, appraisement, and sale of these segregated coal and asphalt lands. By joint resolution approved December 8, 1913, 38 Stat. 767, the foregoing act was amended so as to require that the classification of these lands be completed not later than sixty days from the date of approval of that resolution: "*Provided*, That at the expiration of such time any classification, appraisement, or other work incident thereto remaining unfinished shall be completed by the Secretary of the Interior under rules and regulations to be prescribed by him, and the sum of $5,000, to be paid out of the Choctaw and Chickasaw tribal funds, is hereby appropriated for such purpose." Pursuant to the authority and direction contained in this act and the resolution, the Secretary of the Interior disbursed during the fiscal years 1912 to 1915, inclusive, a total of $40,225.23 from the interest-bearing funds of plaintiff to its credit in the account known as the "Choctaw 3% Fund." This amount of $40,225.23 is included in the amount of $103,223.64 mentioned in finding 3.

(f) The act of March 3, 1909, 35 Stat. 781, 805, provided "That allottees of the Cherokee, Choctaw, and Chickasaw nations, having remnant allotments due them of not exceeding fifty dollars in value, shall be paid twice the value thereof in lieu of such allotment, by check from the tribal funds of their respective tribes." Pursuant to the authority and direction of this provision, the Secretary made disbursements totaling $4,817.28 during the fiscal years 1915 to 1917, inclusive, from the interest-bearing funds of plaintiff to its credit in the account known as "Choctaw 3% Fund."

26. *Alleged illegal reduction of interest on treaty trust fund.*—The above-mentioned "Choctaw 3% Fund" was set up under the following circumstances: A $500,000 five percent trust fund was created under the provisions of Art. 13 of the treaty dated June 22, 1855, 11 Stat. 611, for the benefit of the Choctaw Nation. The residue of this trust fund, amounting to $390,257.92, effective January 1, 1908, was continued and reduced to a 3 percent trust fund by the act of March 1, 1907, 34 Stat. 1027. If it be held that in view of the treaty of 1855 Congress was without authority or violated that treaty, in changing the rate of interest from

5 to 3 percent, the amount to which plaintiff is entitled is $63,423.11, representing the difference between interest at 5 percent as provided in the treaty of 1855 and 3 percent specified in the act of 1907 on the principal of the fund from January 1, 1908, to the dates on which the amount of $390,257.92 was disbursed for the purposes mentioned.

27. *Claimed interest on trust-fund disbursements.*—If it should be held that the various acts of Congress under which the principal of each of the four trust funds as mentioned in finding 25 was disbursed were not sufficiently specific to authorize such disbursements and that they were therefore illegally made and must be returned, or restored, and offset by a like amount under the offset statute of 1935, the interest on $978,787.31, the total of such trust funds from dates of disbursements to June 30, 1935, is $1,233,907.40.

OFFSETS OF GRATUITOUS EXPENDITURES AND DISBURSEMENTS BY DEFENDANT FOR THE BENEFIT OF PLAINTIFF TRIBE WITHOUT OBLIGATION UNDER ANY TREATY OR AGREEMENT WITH PLAINTIFF

28. During the period from 1806 to 1824, inclusive, the United States expended from public funds gratuitously for the benefit of plaintiff, and without obligation under any treaty or agreement, and under other than treaty or contractual appropriations the sum of $102,969.90 for the following purposes:

Purpose	Amount
Agency buildings and repairs	$2, 412. 93
Agricultural implements and equipment	561. 62
Burial of Indians	64. 00
Clothing	33. 87
Damages	400. 00
Depredations	1, 029. 00
Education	21, 228. 21
Fuel, light, and water	130. 25
Hardware, glass, oils, and paints	1, 506. 77
Household equipment	70. 00
Livestock	1, 520. 00
Medical attention	185. 06
Miscellaneous agency expenses	2, 949. 14
Pay of blacksmiths	14, 110. 31
Pay of Indian agents	23, 790. 82
Pay of interpreters	11, 445. 50
Pay of subagents	866. 67
Pay of weavers	2, 610. 00
Presents	1, 264. 11
Provisions and other rations	10, 621. 45
Pay of wheelwright	2, 901. 75
Transportation, etc., of supplies	3, 268. 44

Plaintiff objects to any offset under this finding on the ground that all the expenditures therein were made prior to the date of the treaty, agreement, or act of Congress under which any of its claims presented in this case arose, but concedes that the total of all items in this finding is a proper offset under the offset act of August 12, 1935, 47 Stat. 571, 596, against any claim which arose under any treaty, agreement, or act of Congress in or prior to the years mentioned.

29. During the period from 1825 to 1837, inclusive, the United States expended from public funds gratuitiously for the benefit of plaintiff, and without obligation under any treaty or agreement, and under other than treaty or contractual appropriations the sum of $83,270.78 for the following purposes:

Purpose	Amount
1. Agency buildings and repairs	$1, 059. 79
2. Agricultural aid	18. 40
3. Annuity expenses	540. 00
4. Blacksmith shop supplies	832. 35
5. Burial of Indians	157. 82
6. Clothing	10. 47
7. Depredations	684. 50
8. Education	13, 806. 79
9. Expenses of delegations	1, 758. 42
10. Feed and care of livestock	9. 52
11. Hardware, glass, oils, and paints	1, 405. 24
12. Household equipment	173. 70
13. Medical attention	47. 75
14. Miscellaneous agency expenses	2, 438. 77
15. Pay of blacksmiths	7, 339. 17
16. Pay of Indian agents	14, 850. 00
17. Pay of interpreters	12, 236. 50
18. Pay of subagents	4, 866. 67
19. Presents	2, 086. 87
20. Provisions and other rations	14, 414. 13
21. Surveying	148. 00
22. Transportation, etc., of supplies	4, 385. 92

If the gratuitous expenditures for the years above mentioned in this finding are held to have been expended subsequent to the date of the treaty, agreement, or act of Congress under which any of plaintiff's allowed claims arose, and therefore are deductible under the offset statute of 1935, plaintiff then concedes an offset of $79,648.76 under this finding, being the total of items 1 to 8, inclusive, 10 to 13, inclusive, 15, 16, and 18 to 22, inclusive, and $1,638.30 of item 14, and $11,173.37 of item 17. As to the balance, plaintiff insists that $3,622.02, being item 9, and a part of items 14

and 17, was expended pursuant to treaty obligations, and that $216.04, being items 5, 6, and 13, was an expenditure for the benefit of the individual Indians rather than for the benefit of the tribe as a whole and, therefore, not a proper offset.

30. During the period from 1838 to the end of fiscal year 1854, inclusive, the United States expended from public funds gratuitously for the benefit of plaintiff and without obligation under other than treaty or contractual appropriations the sum of $64,471.93 for the following purposes:

Purpose	Amount
1. Agency buildings and repairs	$1,463.42
2. Annuity expenses	62.00
3. Education	39,005.79
4. Expenses of delegations	785.62
5. Fuel, light, and water	241.12
6. Legal services	150.00
7. Miscellaneous agency expenses	3,172.06
8. Pay of interpreters	4,808.52
9. Provisions and other rations	8,387.66
10. Transportation, etc., of supplies	6,395.74

If the expenditures for the years above mentioned in this finding are found to be chargeable under the act of 1935 against any allowed claim of plaintiff, then plaintiff concedes $48,391.07, the total of items 2, 3, 4, 6, and 9 to be a proper offset. As to the balance of $16,080.86, being items 1, 5, 7, 8, and 10, plaintiff insists that this was an expenditure under and pursuant to obligations of a treaty or agreements.

31. During the period from the fiscal year 1855 to the end of fiscal year 1865, inclusive, the United States expended from public funds gratuitously for the benefit of plaintiff and without obligation under other than treaty or contractual appropriations the sum of $27,590.92 for the following purposes:

Purpose	Amount
1. Agency buildings and repairs	$541.79
2. Education	14,000.00
3. Feed and care of livestock	193.25
4. Fuel, light, and water	70.00
5. Miscellaneous agency expenses	7,013.28
6. Pay of interpreters	2,700.00
7. Pay of miscellaneous employees	584.00
8. Presents	1,300.00
9. Provisions and other rations	1,188.60

The first claim of plaintiff made in this suit arose under the treaty of June 22, 1855, 11 Stat. 611. Other claims arose under subsequent treaties, agreements, and acts of Congress, therefore such of the gratuitous expenditures set forth in the above finding which were made subsequent to the date of the treaty or agreement under which claims are asserted constitute proper offsets under the act of 1935 against any allowed claim of plaintiff. It therefore concedes that $16,488.60, being the total of items 2, 8, and 9, is a proper offset if within the period specified in the act of 1935. It insists that $11,102.32, being items 1 and 3 to 7, inclusive, was an expenditure under and pursuant to treaty obligations.

32. During the period from the fiscal year 1866 to the end of fiscal year 1896, inclusive, the United States expended from public funds gratuitously for the benefit of plaintiff and without obligation under other than treaty or contractual appropriations the sum of $10,474.70 for the following purposes:

Purpose	Amount
1. Education	$5,788.82
2. Expenses of delegations	200.00
3. Medical attention	10.00
4. Miscellaneous agency expenses	1,175.89
5. Pay of interpreters	3,299.99

The expenditures mentioned in this finding were made subsequent to the date of the treaty under which certain of plaintiff's claims arose and, to that extent, are proper offsets against any such claim as may be allowed. Plaintiff concedes that $5,998.82, being items 1, 2, and 3, is a proper offset. It insists that the balance of $4,475.88, the total of items 4 and 5, was an expenditure under and pursuant to treaty obligations.

33. During the period from the fiscal year 1897 to the end of the fiscal year 1934, inclusive, the United States expended from public funds gratuitously for the benefit of plaintiff and without obligation under other than treaty or contractual appropriations the sum of $122,397.09 for the following purposes:

Purpose	Amount
1. Automobiles and repairs	$236.59
2. Burial of Indians	350.75
3. Education	88,441.82
4. Medical attention	30,939.22
5. Miscellaneous agency expenses	2,148.41
6. Pay of miscellaneous employees	237.00
7. Provisions and other rations	43.30

The expenditures mentioned in this finding were made subsequent to the date of the treaty and the Atoka agreement under which certain of plaintiff's claims arose. Plaintiff concedes $31,176.22, being the total of items 4 and 6, as a proper offset but contends that none of the other items in the finding is a proper offset under the act of 1935. It insists, first, that $2,385 (total of items 1 and 5) was expended under and pursuant to treaty obligations in the operation of the Muskogee, Oklahoma, agency and made necessary for the reason that the government deemed it advisable to supervise the property interests of the restricted class of the Choctaw Indians, and that the expenditure was therefore for the benefit of the individual Indians rather than for the benefit of the tribe as a whole; second, that $88,835.87 (total of items 2, 3, and 7) was likewise for the benefit of individual Indians; and third, that the balance of $28,307.13 was a gratuitous expenditure but, since it was expended subsequent to June 30, 1929, it is not a proper offset because none of plaintiff's claims arose subsequent to that fiscal year.

34. During the period from the fiscal year 1855 to the end of the fiscal year 1865, the United States expended from public funds gratuitously for the benefit of the Choctaw and Chickasaw nations, and without obligation, the sum of $10,834.47 for the following purposes:

Purpose	Amount
1. Agency buildings and repairs	$600.45
2. Fuel, light, and water	248.60
3. Miscellaneous agency expenses	7,955.76
4. Pay of interpreters	1,103.00
5. Provisions and other rations	889.66
6. Transportation, etc., of supplies	37.00

The expenditures shown in this finding were made subsequent to such claims of plaintiff as were made under the treaty of 1855 and are, therefore, proper offsets against such claim if allowed. However, plaintiff objects to the offset of the entire amount of this finding on the grounds, first, that it was expended prior to the date on which any claim asserted against the government arose; second, that the entire amount, except item 5, was a payment pursuant to treaty obligations; and third, that item 5, in the amount of $889.66 was an expenditure for the benefit of individual Indians and not for the benefit of the tribe as a whole.

35. During the period from the fiscal year 1866 to the end of the fiscal year 1896, the United States expended from public funds gratuitously for the benefit of the Choctaw and Chickasaw nations, and without obligation, the sum of $32,543.63 for the following purposes:

Purpose	Amount
1. Agency buildings and repairs	$5,056.50
2. Agricultural implements and equipment	230.50
3. Education	11,233.53
4. Feed and care of livestock	956.88
5. Fuel, light, and water	671.57
6. General office expenses	827.65
7. Hardware, glass, oils, and paints	2.50
8. Livestock	345.00
9. Miscellaneous agency expenses	12,220.50
10. Pay of interpreters	200.00
11. Provisions and other rations	147.50
12. Transportation, etc., of supplies	651.50

The expenditures mentioned in this finding were made subsequent to such claims of plaintiff as arose under the treaties of 1855 and 1866. Plaintiff concedes that if the amounts are so chargeable that 75% of $11,614.03 (items 2, 3, 7, and 11), or $8,710.52, is a proper offset. It objects to the balance on the grounds, first, that $20,929.60 (total of items 1, 4, 5, 6, 8, 9, 10, and 12) was under and pursuant to treaty obligations and, second, that $380.50 (total of items 2, 7, and 11) was for the benefit of the individual Indians only.

36. During the period from the fiscal year 1897 to the end of the fiscal year 1934, the United States expended from public funds gratuitously and without obligation under any

treaty or agreement and for the benefit of the Choctaw and Chickasaw Nations the sum of $445,013.43 for the following purposes:

Purpose	Appropriations	Amount
1. Clothing	Conservation of health among Indians	$129.83
2. Education	Purchase and transportation of Indian supplies.	501.74
3. Feed and care of horses	Incidentals in Indian territory, including employees.	120.00
4. Fuel, light, and water	Conservation of health among Indians	151.63
5. General office expenses	Administration of affairs of Five Civilized Tribes.	230,221.12
	Commission, Five Civilized Tribes.	
6. Hardware, glass, oils, and paints.	Conservation of health among Indians	9.49
7. Incidental expenses	Incidentals in Indian territory	694.90
	Incidentals in Indian territory, including employees.	
	Protection of the people of the Indian territory.	
8. Expenses of locating coal and asphalt land.	Commission, Five Civilized Tribes	1,662.89
9. Medical attention, Choctaw-Chickasaw Hospital.	Increase of compensation Indian service	179,531.61
	Indian school and agency buildings	------------
	Relieving distress and prevention, etc., of diseases among Indians.	
10. Miscellaneous agency expenses.	Conservation of health among Indians	1,269.40
	Support and civilization of Indians	------------
11. Pay of miscellaneous employees.	Incidentals in Indian territory, including employees.	2,065.00
	Incidentals, inspectors office, Indian territory, including employees.	
	Protection of the people of the Indian territory.	
12. Per capital payment, expenses.	Administration of affairs of Five Civilized Tribes.	208.71
13. Preservation of records	Preservation of records, office of Superintendent of Five Civilized Tribes.	386.05
14. Probate expenses	Probate attorneys, Five Civilized Tribes	540.77
15. Expense of protecting property interests.	Protecting property interest of minor allottees. Five Civilized Tribes.	356.50
16. Provisions and other rations	Conservation of health among Indians	54.75
17. Expense of timber estimating	Administration of affairs of Five Civilized Tribes.	7,035.45
	Commission, Five Civilized Tribes	------------
18. Transportation, etc., of supplies.	Conservation of health among Indians	15,679.51
19. Traveling expenses	Incidentals in Indian territory	4,394.08
	Incidentals in Oklahoma, including employees.	
	Protection of the people of the Indian territory.	

37. During the period from 1838 to 1934, the members of the Choctaw Nation composed approximately 75% of the total population of the Choctaw and Chickasaw Nations. Upon that basis the defendant expended gratuitously, for the benefit of the Choctaw Nation and without obligation under any treaty or agreement, 75% of the expenditures hereinbe-

fore shown to have been made on behalf of the Choctaw and Chickasaw Nations in findings 34 to 36, inclusive, amounting to $366,293.65.

38. During the period from the fiscal year 1866 to the end of the fiscal year 1896, the United States expended from public funds gratuitously and without obligation under any treaty or agreement, and for the benefit of the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Tribes or Nations the sum of $117,284.21 for the following purposes:

Purpose	Appropriations	Amount
1. Agency buildings and repairs	Buildings at agencies and repairs Contingencies, Indian Department	$6,184.05
2. Agricultural implements and equipment.	Contingencies, Indian Department	152.20
3. Feed and care of livestock	Contingencies, Indian Department	1,396.28
4. Fuel, light, and water	Contingencies, Indian Department	731.50
5. General office expenses	Commission, Five Civilized Tribes	62,647.34
6. Hardware, glass, oils, and paints	Contingencies, Indian Department	11.24
7. Livestock	Contingencies, Indian Department	547.50
8. Medical attention	Contingencies, Indian Department Vaccination of Indians	661.65
9. Miscellaneous agency expenses	Contingencies, Indian Department Telegraphing and purchase of Indian supplies.	4,234.96
10. Pay and expenses of farmers	Contingencies, Indian Department	226.67
11. Pay of miscellaneous employees	Contingencies, Indian Department Incidental expenses of Indian Service in central superintendency.	39,657.75
12. Pay of skilled employees	Contingencies, Indian Department	415.80
13. Transportation, etc., of supplies	Contingencies, Indian Department Transportation of Indian supplies	417.27

39. During the period from the fiscal year 1897 to the end of the fiscal year 1934, the United States expended from public funds gratuitously for the benefit of the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations or Tribes of Indians, and without obligation under any treaty or agreement, the sum of $10,977,303.65 for the following purposes:

Purpose	Appropriations	Amount
Agency buildings and repairs	Buildings at agencies and repairs General expenses, Indian Service. Indian agency buildings. Indian school and agency buildings.	$124,610.17
Agricultural aid	Agriculture and stock raising among Indians. Support of Indians and Administration of Indian property.	24,331.81
Appraisal and sale of restricted land.	Appraisal and sale of restricted lands, Five Civilized Tribes.	24,999.20
Automobiles and repairs	Administration of Indian forests Conservation of health among Indians. Field representatives, Indian Service. Support of Indians and administration of Indian property.	23,799.99

Reporter's Statement of the Case

Purpose	Appropriations	Amount
Construction and maintenance: Claremore Hospital.	Conservation of health among Indians Indian agency buildings. Increase of compensation, Indian Service. Indian school buildings. Purchase and transportation of Indian supplies.	$77, 127. 98
Copying allotment records	Copying records, alloted lands, Five Civilized Tribes.	14, 648. 72
Education	Care of orphan children, Indian territory Conservation of health among Indians. Increase of compensation, Indian Service. Purchase and transportation of Indian supplies. Transportation of Indian supplies.	2, 177, 277. 86
Feed and care of horses	Incidentals in Indian territory Protection of people of the Indian territory.	3, 371. 96
Fuel, light, and water	Contingencies, Indian Department General expenses, Indian Service.	168. 20
General office expenses	Administration of affairs of Five Civilized Tribes. Commission, Five Civilized Tribes.	4, 290, 637. 65
Household equipment	Support of Indian and administration of Indian property.	2, 625. 33
Incidental expenses	Contingencies, Indian Department Incidentals in Indian territory. Protection of people of the Indian territory.	30, 115. 98
Investigating leases	Investigation of fraudulent leases, allotted lands, Five Civilized Tribes.	29, 955. 95
Leasing of mineral and other lands	Administration of affairs of Five Civilized Tribes. Commission, Five Civilized Tribes.	4, 514. 39
Livestock	Support of Indians and administration of Indian property.	1, 290. 00
Medical attention	Conservation of health among Indians Relieving distress and prevention, etc., of disease among Indians. Suppressing the spread of smallpox, Indian territory.	976. 41
Miscellaneous agency expenses	Agriculture and stock raising among Indians. Conservation of health among Indians. Relieving distress and prevention, etc., of diseases among Indians. General expenses, Indian Service. Telegraphing and purchase of Indian supplies. Field representatives, Indian Service.	215, 503. 92
Oil and gas expenses	Administration of affairs of the Five Civilized Tribes.	7, 028. 28
Oil and gas mining supervision allotted lands.	Oil and gas inspectors, Five Civilized Tribes.	85, 703. 40
Pay and expenses of farmers	Agriculture and stock raising among Indians. Contingencies, Indian Department. Increase of compensation, Indian Service. Industrial work and care of timber.	327, 566. 96
Pay and expenses of field matron	Increase of compensation, Indian Service Industrial work and care of timber.	6, 217, 32
Pay of interpreters	Increase in compensation, Indian Service Support and civilization of Indians.	125, 783. 64
Pay of miscellaneous employees	Conservation of health among Indians Contingencies, Indian Department. Incidental expenses of Indian Service. Support and civilization of Indians. Support of Indians and administration of Indian property.	1, 721, 385. 80
Per capita payment expenses	Administration of affairs of Five Civilized Tribes.	111. 43
Preservation of records	Preservation of records, office of Superintendent of Five Civilized Tribes.	8, 886. 62
Probate expenses	General expenses, Indian Service Increase of compensation, Indian Service. Probate attorneys, Five Civilized Tribes. Support of Indians and admin istration of Indian property.	1, 053, 120. 71

Purpose	Appropriations	Amount
Protecting property interests	Protecting property interest of minor allottees, Five Civilized Tribes.	$386,847.59
Provisions and other rations	Support of Indians and administration of Indian property.	139.27
Purchase of horses	Incidentals in Indian territory, including employees. Protecting of people of the Indian territory.	720.00
Removal of alienation restrictions	Removal of restrictions, allotted lands, Five Civilized Tribes.	88,346.12
Sale of allotted lands	Administration of affairs of Five Civilized Tribes.	265.12
Sale of restricted lands	Administration of affairs of Five Civilized Tribes.	1,577.09
Sale of unallotted lands	Administration of affairs of Five Civilized Tribes. Sale of unallotted lands, Five Civilized Tribes. Reimbursable.	53,538.80
Timber estimating	Administration of affairs of Five Civilized Tribes. Commission, Five Civilized Tribes.	33,776.10
Transportation, etc., of supplies	Contingencies, Indian Department Copying records allotted lands Five Civilized Tribes. Purchase and transportation of Indian supplies. Support of Indians and administration of Indian property. Telegraphing, transportation, etc., Indian supplies. Transportation of Indian supplies.	7,932.33
Traveling expenses	Contingencies, Indian Department Incidentals in Indian territory. Indian schools, Five Civilized Tribes, surplus court fees. Traveling expenses, Indian inspectors.	22,401.55

With reference to the gratuitous expenditures from public funds set forth in the foregoing findings, 36 to 39, inclusive, plaintiff concedes under finding 36 that $672.96 (being 75% of $897.28, total of items 2, 6, and 13) is a proper offset against any allowed claim under the treaty of 1855 or subsequent treaties, agreements, or acts of Congress; and that under finding 38, $403.14 (being 27.47% of $1,467.56, the total of items 2, 6, 8, 10, and 12) is a proper offset. It objects to any offset on account of any amount under any of the other items set forth in the foregoing findings 36 to 39, inclusive, on the grounds that all such amounts were expenditures from public funds (1) for fulfilling and discharging obligations assumed by the United States under a treaty, or the Atoka and Supplemental agreements; (2) for the benefit of the individual Indians rather than for the benefit of the tribe as a whole; and (3) disbursements made subsequent to the fiscal year ending June 30, 1929.

40. During the period from 1866 to the end of the fiscal year 1934 the Choctaw tribe of Indians composed 27.47% of the total population of the Cherokee, Choctaw, Chickasaw, Seminole, and Creek tribes of Indians. Upon that basis defendent expended for the benefit of plaintiff gratuitously and without obligation 27.47% of the sum of $11,094,587.86 shown to have been expended by defendant in findings 38 and 39, said amount being $3,047,683.29.

RECAPITULATION OF OFFSETS

Finding 28	$102, 969. 90
Finding 29	83, 270. 78
Finding 30	64, 471. 93
Finding 31	27, 590. 92
Finding 32	10, 474. 70
Finding 33	122, 397. 09
Findings 34–37, incl	366, 293. 65
Findings 38–40, incl	3, 047, 683. 29
Total	3, 825, 152. 26

The court decided as a conclusion of law that the plaintiff was entitled to recover the sum of $63,423.11 (Finding 26) and that the defendant on its counterclaim was entitled to an offset against the plaintiff of gratuity disbursements amounting to $3,574,439.65, and that the plaintiff, accordingly, was not entitled to a judgment against the United States.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff contends for a judgment of $4,188,913.32 which includes interest of $1,703,107.20 from various dates to June 30, 1935, on $1,121,253.29 of the items making up the total of the principal amount of $2,485,806.12 claimed. In addition, interest is claimed to date of judgment. Recovery of the amounts mentioned in findings 1 to 27, inclusive, with interest, is based upon alleged failure of the government to observe the stipulations of Art. 13, treaty of June 22, 1855, 11 Stat. 611; Arts. 3, 13, and 46 of the treaty of April 28, 1866, proclaimed July 10, 1866, 14 Stat. 769, the Atoka agreement of April 23, 1897, ratified June 28, 1898, 30 Stat. 495, and the Supplemental agreement thereto of July 1, 1902, 32 Stat. 641, and certain acts of Congress, as well as certain alleged

illegal disbursements made by the defendant through the Secretary of the Interior from noninterest- and interest-bearing funds of plaintiff alleged to have been contrary to and in excess of congressional appropriations, and in excess of and contrary to authority contained in such agreements and various acts of Congress, hereinafter mentioned in more detail.

The record discloses a great mass of accounting over a long period of time with respect to the management of affairs of the plaintiff tribe, the handling and disposition of its property and funds derived from such management, disposition, and sale, and the disbursements made from such funds at various times and for various purposes. From the standpoint of accounting the case is much involved, difficult to analyze, and more difficult to express, but the issues between the parties as to the right of plaintiff to recover on any or all of the items involved, and the right of the defendant to offset various gratuitous expenditures, set forth as having been made for the benefit of plaintiff tribe, are governed by certain definite principles of law which we think have been adjudicated and settled in prior decisions involving the relationship of Indian tribes with the Government, and the plenary power of Congress to legislate with respect to the affairs, property, and funds of the Indian tribes.

The Choctaw and Chickasaw tribes were originally located in the southern section of Mississippi. In 1830 and 1832 the tribes removed pursuant to treaty stipulations to the Indian Territory, and there occupied jointly land ceded to them by the United States in lieu of the Mississippi lands. In a treaty of 1855 between the United States and these tribes, their reservation in the Indian Territory was definitely separated; the Choctaws occupied an assigned portion, and the Chickasaws their portion. In 1866 and subsequently, other treaties and agreements were entered into between plaintiff and the United States, and certain acts of Congress were enacted with reference to the tribal property and funds of plaintiff, under all of which the claims here involved arose. The pertinent provisions of these treaties, agreements, and acts of Congress will be hereinafter mentioned in

connection with a discussion of the various items of the claims herein made by the plaintiff.

Prior to the Atoka agreement dated April 23, 1897, ratified and incorporated as section 29 of the Curtis Act of June 28, 1898, 30 Stat. 495, the tribal property of plaintiff was held in common by the tribe under a patent issued therefor by the United States to the Tribal Government. Plaintiff also, with the recognition and approval of the United States, maintained its own government, enacted its own laws not inconsistent with the treaty provisions and acts of Congress, and, subject to the approval of the United States, managed its own affairs and disbursed its own funds. In 1893, due to the unsatisfactory manner in which the tribal government was being maintained and operated, the fact that white people who had moved on the reservation outnumbered the Indians 5 to 1, and whom the tribal government had not removed or requested the United States to remove, and the fact that the rights and interests of the members of the tribe in and to the common property and funds were not being properly protected and managed, Congress by section 16 of the act of March 3, 1893, 27 Stat. 612, 645, authorized the President to appoint a commission to enter into negotiations with the Five Civilized Tribes for the purpose of extinguishment of the national or tribal title to any lands then held by any or all such nations or tribes either by cession of the same, or some part thereof, to the United States for disposition for the benefit of the Indians, or by allotment and division of same in severalty among the Indians of such nations and tribes, respectively, as might be entitled to the same, or by such other method as might be agreed upon between the several nations and tribes, or each of them, with the United States, with a view to such an adjustment upon the basis of justice and equity as might, with the consent of such nation or tribe so far as might be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union to embrace the lands within the Indian Territory. The Commission commonly styled the "Dawes Commission" was appointed and, in May 1894 and subsequently, made reports which are

quoted at length in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 447, 453, disclosing the existence of the conditions heretofore mentioned, and others. By the act of June 10, 1896, 29 Stat. 321, 339, Congress directed the Commission "to continue the exercise of the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them * * *."

Pursuant to the direction of Congress and the authority conferred upon it, the Dawes Commission continued negotiations, and, on April 23, 1897, arrived at an agreement known as the "Atoka agreement" with plaintiff tribe, which, as amended by Congress, was ratified by section 29 of the act of June 28, 1898, 30 Stat. 495, commonly known as the "Curtis Act," entitled "An Act for the protection of the people of the Indian Territory, and for other purposes." The agreement, as amended, was accepted by a vote of the members of the Choctaw Tribe at an election held for that purpose. The whole purpose of this agreement and the Supplemental agreement of 1902, 32 Stat. 641, subsequently made, and the purposes designed and intended to be accomplished thereby, were for the United States government to take over the management, control, and administration of the property, affairs, and funds of the tribe or nation theretofore exercised by the tribal government, to continue the tribal government only for limited purposes, and to administer and dispose of the property and funds of the Indians for their benefit. In view of existing conditions, all of this could have been accomplished by an act of Congress. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Choate* v. *Trapp*, 224 U. S. 665. To this end, and in order that a state or states might be created in the Indian Territory, the Atoka and Supplemental agreements contained many provisions as to the manner in which the lands and other property of the tribe should be handled and disposed of under the supervision and control of the government of the United States for the benefit of the Indians. The Atoka and Supplemental agreements provided for the allotment of certain of the lands to members of the tribe, the reservation from allotment of other lands, including coal and asphalt lands; for the surveying, platting, and selling of certain town sites and town lots, and

the disposition of the proceeds from town lots *per capita* to members of the tribe. These agreements contained a number of other detailed provisions designed to effect and carry out the many purposes intended to be accomplished, among which were the following: Surveying, platting, grading, and appraising lands for allotment; allotting lands to individual Indians of the tribe; surveying, platting, appraising, and disposing of town sites and town lots; settling of all controversies between members of the tribe as to their right to have certain lands allotted to them; the placing of each allottee in possession of his allotment, and the removal of all persons therefrom objectionable to the allottee; surveying, marking, and locating the 98th meridian of west longitude between Red and Canadian Rivers before allotment of lands should begin; providing proper records of land titles; collecting of all revenue from coal and asphalt lands; *per capita* payments through a bonded officer of the United States; paying of money from the sale of town lots therein specified into the treasury, and the disposition thereof at the end of each year to the tribe, each member receiving an equal portion thereof. After making provision with reference to town sites, and the appraisal and sale of town lots, 30 Stat. 495, 508, 509, the Atoka agreement provided that all payments from the sale of town lots as therein provided should be paid into the Treasury of the United States, and that the money so paid into the Treasury "shall be for the benefit of the members of the Choctaw and Chickasaw tribes (freedmen excepted), and at the end of one year from the ratification of this agreement, and at the end of each year thereafter, the funds so accumulated shall be divided and paid to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof." Then followed, in this agreement, this provision: "That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading, appraising, and allotting the lands, or for appraising and disposing of the town lots as herein provided." The Atoka agreement contained no other provision by which the United States specifically agreed to assume and pay

expenses incident to the management, control, and disposition of the affairs and property of the tribe as provided for in the agreement, and as subsequently directed from time to time by Congress.

The Supplemental agreement of 1902, 32 Stat. 641, 649–51, contained no provision under which the United States specifically assumed any obligation to bear the expense incident to the management, control, and disposition of the property and funds of plaintiff tribe. This agreement provided for allotments to members of the tribe; the sale of unallotted lands; the placing by United States Indian agents of each allottee in possession of his allotment, and the removal of objectionable persons therefrom; the compilation of rolls of citizens; the creation of a Citizenship Court, and the payment by the United States of the salaries and traveling expenses of the judges, as well as the salaries of clerks; the making of a roll of Chickasaw freedmen, and allotments of 40 acres to each; ascertainment of lands valuable for coal, and the setting aside thereof for the common benefit of members of the tribe; disposition of the proceeds from sale of coal lands *per capita;* the recording of patents without expense to allottee or grantee, and the payment to each citizen of the nation $40 per capita, after the approval of his patent.

This Supplemental agreement provided that the unallotted lands "shall be sold at public auction under such rules and regulations, and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws, and distributed per capita as other funds of the tribes."

With reference to the sale of unallotted coal and asphalt lands and deposits, this agreement provided that "the proceeds * * * shall be deposited in the Treasury of the United States to the credit of said tribes and paid out per capita to the members of said tribes (freedmen excepted) with the other moneys belonging to said tribes in the manner provided by law."

The first item of plaintiff's claim (finding 1) arises under Arts. 3 and 46 of the treaty dated April 28, 1866, ratified July 10, 1866, 14 Stat. 769.

Under this item plaintiff seeks to recover $286,142.18, of which $79,082.87 is alleged to be due as principal in connection with the transaction disclosed by the finding and $207,-059.31 is interest at 5 percent thereon from May 21, 1883, to June 30, 1935. In addition the right to interest on the $79,082.87 is asserted to date of judgment.

The Choctaws and Chickasaws owned slaves and when the Civil War broke out both tribes joined the Confederacy. The treaty of 1866 accomplished, among other things, the restoration of amicable relations between the Indians and the government, reaffirmed their title to their landed estates and, of importance to the items now being considered, provided for the acquisition by the government of what is known as the "Leased District," a portion of the Indian reservation. This treaty contained express provision for taking care of the former slaves, i. e., freedmen. Arts. 3 and 46 of this treaty (14 Stat. 769) are as follows:

> ART. 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the

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enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter,—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

ART. 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; *the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five percent*, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. [Italics ours.]

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From the standpoint of law and fact, we think this claim is without merit. In purchasing the "Leased District" the government was concerned with providing for the freedmen. The trust fund of $300,000 was essentially contingent. The creation of the trust as well as the right to interest thereon depended upon the adoption by the Indians of their freedmen within the time specified. The plaintiff not only declined to adopt the freedmen within the two years provided but, at first, refused to do so. It was decidedly adverse to their adoption. It was the act of plaintiff which, according to the treaty, "caused the sum to be held in trust," and it seems clear, therefore, that this particular trust provision of the treaty was ineffective. Evidently anticipating the observance of the treaty, the government appropriated and paid the stipulated rate of interest for two years upon the advancement of $150,000 made to plaintiff under Art. 46 of the treaty. As was held in *United States* v. *The Choctaw Nation et al.* (38 C. Cls. 558, affirmed 193 U. S. 115, 126), "The treaty was not complied with either by the Indians or the United States." In view of this situation Congress enacted the acts of July 26, 1866 (14 Stat. 255, 259), April 10, 1869 (16 Stat. 13, 39), and March 3, 1885 (23 Stat. 362, 366), which in our opinion dispose of the controversy adverse to plaintiff's contention. Under the acts of July 1866 and April 1869, *supra*, the total sum of $22,000 was paid to plaintiff as the amount of interest for 1867 and 1868 on the principal sum of $225,000 notwithstanding the principal sum had been reduced to $75,000 as a result of the advance payment of $150,000 made in accordance with Art. 46 of the treaty. Consequently, when the plaintiff did adopt the freedmen in 1883 and Congress provided for the settlement of the balance due plaintiff under the treaty, credit was taken by the defendant for the overpayment of interest for 1867 and 1868. In appropriating for interest, the acts provided only for the payment of interest which was due and as no interest was due on the amount of $150,000 immediately paid, credit therefor was properly taken. The act of March 3, 1885, 23 Stat. *supra*, making an appropriation to settle in full plaintiff's claim growing out of Arts. 3 and 46 of the treaty took credit of overpayments on account of interest. It was in accordance with this legislation that the

account, as stated in finding 1, was made. See *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, affirmed 307 U. S. 1. The advancement of $150,000 made under Art. 46 of the treaty of 1866 was to be repaid out of any money of the tribe in the hands of the government and, as Art. 3 of the treaty was complied with, the advancement was to become a credit upon the sum of $225,000 due plaintiff. If not complied with "the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five percent." This article contemplated the conditions which subsequently arose, namely, a contest between the Indians and their freedmen, and upon the basis of same the government under legislation settled it.

The next claim made by plaintiff is for a total of $789,773.17, made up of various items as follows:

1. Expenses of sale of unallotted land	$230, 074. 66
2. Expenses of sale of segregated coal and asphalt land	103, 223. 64
3. Expenses of making per capita payments	126, 805. 31
4. Expenses of appraising improvements	4, 249. 07
5. Pay of miscellaneous employees	67, 542. 20
6. Miscellaneous agency expenses	877. 95
7. Expenses for roads	9, 202. 35
8. Investigating tribal warrants and claims	5, 516. 19
9. Pay of Indian police	8, 591. 74
10. Expenses of sale of tribal buildings	251. 82
11. Insurance on Choctaw capitol	138. 00
12. Expenses of monument to Green McCurtain	500. 00
13. Payments in lieu of allotments	137, 579. 00
14. Expenses of making equalization payments	201. 56
15. Expenses of medical attention	1, 089. 60
16. Expenses of investigating coal and asphalt deposits	38, 416. 27
17. Expenses of office of supervisor of mines	5, 439. 44
18. Expenses of Choctaw-Chickasaw Sanitorium:	
a. Insurance	8, 186. 68
b. Pay of miscellaneous employees	297. 25
c. Roads and grounds	3, 633. 79
19. Expenses of appraising timber	22, 499. 33
20. Expenses of sale of town lots (Sec. 7, Act of May 29, 1908, 35 Stat. 444)	15, 457. 32

In support of this claim plaintiff contends that the defendant was obligated to bear all expenses incident to the carrying out of the provisions of the Atoka and Supplemental

agreements and that any disbursement made from plaintiff's funds for that purpose was illegal and must be refunded.

In the alternative plaintiff claims that if the court decides that the defendant did not obligate itself to bear the expenses incident to carrying out the Atoka and Supplemental agreements and that such expenses were properly and legally disbursed and charged to plaintiff's funds, it is nevertheless entitled to recover $469,921.18 made up of certain of the items above mentioned totaling $67,157.47 alleged to have been disbursed in violation of the provisions of these agreements, $192,608.60 for some of the above-mentioned items and others alleged to have been disbursed in the management and administration of the affairs of the property of plaintiff without appropriation or authority of Congress, and $210,155.11 alleged to have been disbursed in the management of plaintiff's affairs, and in the administration and disposition of its property in excess of congressional appropriations and authority.

The Atoka and Supplemental agreements were consummated for the purpose, among other things, of allotting to members of the tribe the surface of certain lands, the selling of the unallotted lands, and an equal per capita division of the proceeds realized from sales. Section 11 of the Supplemental agreement of 1902, 32 Stat. 641, 642, provided as follows:

> There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw nations; * * *.

The first item of plaintiff's claim now under consideration (finding 2) is for $230,074.66 alleged to have been illegally disbursed from plaintiff's funds for payment of expenses of sale of unallotted land, the contention of plaintiff being, as hereinbefore stated, that all such expenses were obligations to be borne by the United States. This contention of plain-

tiff, which is applicable to all other items claimed by plaintiff to have been disbursed by the defendant from plaintiff's funds in carrying out the provisions of the Atoka and Supplemental agreements, except certain items claimed to have been otherwise in violation of the agreements, without authority of Congress or in excess of congressional appropriation, is predicated upon the provision in the Atoka agreement of 1897 "That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading, appraising, and allotting the lands, or for appraising and disposing of the town lots as herein provided." 30 Stat. 495,509.

The Atoka agreement provided for the allotment of land but did not provide for the sale or disposition of the unallotted lands. This was provided for in the Supplemental agreement. The Atoka agreement did provide for the sale of town lots therein specified and imposed the expense of their sale upon the government. All expenses incident to the sale of town lots surveyed and platted under the Atoka agreement were paid by the United States and are not in controversy here. (The expenses totaling $15,457.32, item 20 above, and sought to be recovered by plaintiff, related to town sites and town lots subsequently platted, surveyed, and sold pursuant to provisions of a subsequent act of Congress, and will be considered later.) Taking the above-quoted provision in the Atoka agreement respecting the sale of town lots as a premise, plaintiff contends that, notwithstanding the absence of any provision in the Atoka or Supplemental agreement charging the government with the expense of sale of the unallotted lands and other expenses incident to carrying out the provisions of these agreements, it is manifest that Congress intended to charge the government with all these expenses. This contention is an unusual one and becomes, we think, untenable in view of the course of legislation involving proceedings and matters of this precise character. When the government assumes the expenses involved in the management, control, and disposition of property of an Indian tribe, it generally provides for so doing, and we cannot infer a liability in this regard where the legislation concerned with

the subject-matter deals specifically with the details of procedure and makes no mention of such an assumed liability. See the acts of March 3, 1911, 36 Stat. 1058, and June 30, 1913, section 19, 38 Stat. 77, 96. In legislation enacted soon after the ratification of these agreements, with reference, among other things, to the sale of segregated lands under the Supplemental agreement, it expressly charged plaintiff with the expense thereof. See acts of April 21, 1904, 33 Stat. 189, 209, and of February 19, 1912, 37 Stat. 67, 70.

As hereinbefore stated, the Atoka and Supplemental agreements, after specifying in detail the matters to be accomplished thereunder, provided simply, except as to town sites and town lots therein provided for, that "the proceeds" should be deposited in the Treasury and distributed per capita. Nothing specifically was said as to whether the term "proceeds" meant gross proceeds or the proceeds less the cost of sale. Neither was anything said in the agreements with reference to who should bear the expense of administering the other provisions of such agreements. In the first place we think it is obvious that the term "proceeds" as used in the agreements means, and was intended to mean, the amount of money produced less the expenses of sale. This is the ordinary meaning usually applied to the term in agreements of this kind where there is nothing to clearly indicate a contrary intention. In re: *Dickson*, 166 Pa. 134, 30 Atl. 1032, 1035; *Wheeler & Wilson Mfg. Co.* v. *Winnett* (Neb.), 91 N. W. 514. In re: *Curtis' Will*, 16 N. Y. Supp. 180, Hun. 372; *Armour Packing Co.* v. *London*, 53 So. Car. 539; 31 S. E. 500, 502; *Daly* v. *Crawford* (Mass.), 181 N. E. 396, 398; *Roosevelt's Estate*, 228 N. Y. Supp., 323, 326; 131 Misc. 800. In *Church* v. *Hubbart*, 2 Cranch 187, it was held that words in a contract which admit of a more extensive or more restricted signification must be taken in that sense which is required by the subject-matter and will best effectuate what it is reasonable to suppose was the real intention of the parties. It is the duty of the court, in order to decide upon the meaning of a written instrument, to look not only to the language employed but to the subject-matter and the surrounding circumstances. In *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, it was held that a contract includes not

only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it is made. *Smith* v. *Bell*, 6 Pet. 68; *Nash* v. *Towne*, 5 Wall. 689; *Chicago, Rock Island and Pacific Ry. Co.* v. *Denver and Rio Grande R. R. Co.*, 143 U. S. 596. The intent of the contract must be deduced from the entire instrument, from its subject-matter, from the purpose of its execution, and the circumstances of the parties when they made it must prevail over any careless recitals therein, unless the intent so gathered runs counter to the plain sense of the binding words of the agreement. *U. S. Fidelity & Guaranty Co.* v. *Board of Woodson County, Kan.*, 145 Fed. 144; *Hawkeye Commercial Men's Ass'n* v. *Christy*, 294 Fed. 208; U. S. *Fidelity & Guaranty Co.* v. *French Mut. Gen. Society of Mut. Ins. against Theft*, 212 Fed. 620; *Knowlton* v. *Oliver*, 28 Fed. 516.

Plaintiff contends that any doubt as to whether the plaintiff or the government was to bear the expenses of administering the agreements and the expenses of sale of the unallotted lands and the coal and asphalt lands and deposits, such doubt should be resolved in favor of plaintiff and the defendant held to have assumed such obligations. But this contention, in view of the circumstances and the purposes which brought about the execution of the agreements and the purposes intended to be accomplished thereby, does not help the plaintiff here. In *Carpenter et al.* v. *Shaw*, 280 U. S. 363, 365, it was held that while the language used in Indian treaties should never be construed to the prejudice of the Indians, words used therein should be considered as having been used according to their plain import as connected with the tenor of the treaty, and in *Blackfeet, et al. Tribes of Indians* v. *United States*, 81 C. Cls. 101, this court held that the rule as to construction of treaties with the Indians most favorable to the Indians does not extend to the point of permitting the court to indulge in presumptions and implications of assumed obligations by the government where the attendant facts and circumstances clearly negative any intention upon the part of the government to assume such obligations.

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In the second place the government was deriving no pecuniary benefit under the agreements. No monetary consideration passed thereunder from the government to the Indians or from the Indians to the government. There was no cession by plaintiff of any property to the government, nor was there any surrender by plaintiff of any rights to the property which it owned or to the proceeds from any disposition thereof. The gross proceeds and revenue derived by plaintiff under the Atoka agreements and from royalties and revenue were at least $24,800,000. If the agreements had been drawn so as to provide in all respects as they did, except that the affairs of the tribe should be managed, and its property controlled and disposed of in accordance with the terms agreed upon by the tribal government instead of the United States, it would be too clear for argument that the United States, at whose instance the agreements were brought about as being for the best interests of the entire tribe, would not be obligated to bear any of the expenses. We think it is equally clear, when the agreements are interpreted in the light of their purpose due to existing conditions, that the assumption by the United States of control of the administration of the affairs of the tribe and the carrying out of the agreements did not impose upon it the obligation of paying all the expenses incident thereto. No instance in the history of Indian policy of the government is cited, and we find none, to show that the United States has, as a general policy, borne the expense of the distribution or sale of tribal property.

For these reasons we hold that the United States was not obligated under the agreements to bear the expenses incident to carrying out the provisions of the agreements and that the plaintiff is not entitled to recover the amounts herein claimed which were disbursed by the defendant from plaintiff's funds for such purposes. This disposes of all the amounts asserted under the claim of plaintiff for $789,773.17, except such of the amounts as are stated in the alternative claim of $469,-921.18. The items of this alternative claim will be considered in the order of the findings.

Plaintiff first asserts under its alternative claim that for the fiscal years 1913 to 1929, inclusive, the amount of $68,-

165.03 was disbursed from its funds (finding 3) for expenses of sale of unallotted lands in excess of congressional appropriations and is recoverable under the *proviso* in the Indian appropriation act of August 24, 1912, 37 Stat. 518, 531, which provided that during the fiscal year ending June 30, 1913, no moneys should be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except for equalization of allotments per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year and attorneys for said tribes employed by contract approved by the President, under existing law, for the current fiscal year. The facts show that the amount disbursed from plaintiff's funds for the purposes mentioned in excess of congressional authority or appropriation subsequent to the fiscal year ending June 30, 1913, was only $8,424.47. Under the rule announced in *Creek Nation* v. *United States*, 78 C. Cls. 474, plaintiff would be entitled to judgment for this amount of $8,424.47 if it were not for the provisions of the act of August 12, 1935, 49 Stat. 571, which provided, at page 596, that in all suits then pending in this Court by any Indian tribe which had not been tried or submitted and in any suit thereafter filed the court should consider and offset against any amount found due the tribe all sums expended gratuitously by the United States for the benefit of the tribe. The act contained a *proviso* to the effect that expenditures made prior to the date of the law, treaty, agreement, or Act of Congress under which the claim arose should not be offset against the claim or claims asserted by the tribe, and a further *proviso* that funds appropriated and expended from tribal funds should not be construed as gratuities. The jurisdictional act in the *Creek case* contained no provision for offsetting disbursements made in the administration of Indian affairs for expenses or purposes for which the United States was not liable or obligated under a treaty or agreement to bear, and which disbursements were for the

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benefit of the Indian tribe concerned. The item of $8,424.47 here in question was a disbursement for the benefit of plaintiff under our holding that the government was not obligated to bear the expense of administering the Atoka and Supplemental agreements. If judgment is entered for plaintiff for this item, the same would be a gratuitous payment out of public funds to plaintiff tribe for an expense which the United States was not obligated to bear, and since it was solely for plaintiff's benefit the same would, therefore, be a proper offset under the act of 1935, *supra.* In these circumstances plaintiff is not entitled to judgment. Congress possesses and has long exercised in many cases the authority to charge Indian tribes with disbursements for their benefit which may be a charge against public funds, for which disbursement the government has not by treaty or agreement assumed responsibility. In some cases reimbursable appropriations are made; in others expenditures are made charges against any amount recovered by suit. In effect, therefore, the provision of the act of 1935 requiring the court to offset sums gratuitouly expended for the benefit of a tribe is a ratification of the disbursements made by the Secretary of the Interior from tribal funds for proper purposes and for the benefit of the tribe which may have been in excess of congressional appropriation; *Crozier* v. *Krupp*, 224 U. S. 290, 305. Certain of the claims here made by plaintiff are for sums disbursed from its funds *without appropriation*, and solely on that account. The second proviso in the 1935 act to the effect that funds appropriated and expended from tribal funds shall not be considered as gratuities does not, therefore, affect the rule above announced, for the reason that the purpose of this proviso was to make clear that the appropriation and expenditure of tribal funds pursuant to the power of Congress over the affairs and property of Indian tribes should not give rise to any charge against the Indians because of the exercise of such power. In other words, if a tribe is held entitled to recover a sum by reason of failure of the government to fulfill an obligation on which it is liable, such recovery shall not be offset by any amount appropriated and expended from tribal funds. Compare *Lone Wolf* v. *Hitchcock*, 187 U. S. 553,

583; *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, affd. 307 U. S. 1; *Chickasaw Nation* v. *United States*, 87 C. Cls. 91. Plaintiff contends that the offset statute of 1935 is unconstitutional on the grounds that it is retroactive, deprives plaintiff of vested rights, and takes from the court its power to administer justice between the parties. We think these contentions are without merit for the reasons hereinafter given in discussing the act of 1935 with reference to offsets for gratuitous expenditures.

The next item of the claim for $68,165.03 (finding 3) is not allowable for the reasons as hereinbefore held that the Atoka and Supplemental agreements did not impose any obligation upon the United States to bear the expense of their administration. The facts show that the amount mentioned in this finding was expended from plaintiff's funds pursuant to congressional authorization.

Under the facts set forth in finding 4, plaintiff makes claim for $119,294.25 which was expended by the Secretary of the Interior from plaintiff's funds for educational purposes for the benefit of plaintiff tribe in certain years between 1913 and 1929 in excess of the amounts specified in the acts of April 26, 1906, and March 7, 1928, mentioned in the finding. Plaintiff is not entitled to judgment for this amount for the reasons above stated with respect to the claim in finding 2 as to the excess disbursement by the Secretary from plaintiff's funds for a purpose which was for its benefit.

The amount here involved was disbursed for an authorized purpose but in excess of the limitation fixed and if judgment were entered for plaintiff for the excess claimed, the same would have to be offset by a like amount under the act of 1935.

The next item claimed by plaintiff (finding 5) is for $58,887.07, representing the total disbursements made by the Secretary during the years 1917 to 1919, inclusive, and 1922 to 1924, inclusive, from plaintiff's funds for its benefit covering the expenses incident to making per capita payments under the Atoka and Supplemental agreements in excess of the amounts appropriated and authorized to be expended for that purpose from plaintiff's funds. Since

this disbursement was for the benefit of plaintiff tribe, it would, if judgment were entered therefor, be offset under the act of 1935 by a like amount. Plaintiff is therefore not entitled to a recovery on this item.

The next claim of plaintiff is for $4,249.07 (finding 6), being the amount disbursed from plaintiff's funds during the fiscal years 1904 and 1905 for expenses in appraising improvements which had been placed upon lands of plaintiff prior to the segregation thereof under the authority of the act of July 1, 1902, ratifying the Supplemental agreement. Section 58 of that act, provided that all the lands of plaintiff classified as containing coal and asphalt deposits should be segregated and reserved from allotment to the Indians. This act also provided that the improvements, of any member or freedman existing upon any of the lands so segregated and reserved at the time of their segregation and reservation, should be appraised under the direction of the Secretary and should "be paid for out of any common funds of the two tribes in the Treasury of the United States, upon the order of the Secretary * * *."

The act of 1902 contained no provision imposing the cost of appraisement upon the government and the only question is whether the Secretary had implied authority to make the disbursements covering the cost of making such appraisements. We think he did. It was impossible properly to administer the provisions of the agreement ratified by the act of July 1, 1902, without an appraisement of the lands and improvements, and it was for the benefit of the Indians that appraisement should be made. Inasmuch, therefore, as provision was made by statute for paying for appraisements out of plaintiff's funds, we think it follows that the cost of completing the transaction under the agreement was to be borne by plaintiff. The Secretary clearly had implied authority to pay this expense out of plaintiff's funds.

The next item of plaintiff's claim is for $68,420.45, made up of amounts of $67,542.20 for pay of miscellaneous employees and $877.95 for miscellaneous agents' expense (finding 7). The facts show that $65,899.96 was expended during 1905 to 1912, inclusive, from plaintiff's funds for its benefit to cover

expenses of miscellaneous employees and miscellaneous agents' expenses, and the amount of $2,520.49 was expended for the same purposes during 1913 and 1919.

Plaintiff contends that these expenses come within the purview of annual appropriation acts making appropriations from public funds for the operation of the Interior Department, and that the cost of Indian agencies, payment of Indian agency employees, and other agency expenses are purely administrative expenses of the Interior Department for which the government is responsible and for which no charge should be made against the Indian tribe. In *Creek Nation* v. *United States*, 78 C. Cls. 474, 490, we held that the Curtis Act, which took away from the Indian authorities the control which they formerly exercised over tribal property and funds, by clear and necessary implication vested the Secretary of the Interior with authority "to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs" of the Indians. The decision in that case precludes recovery of the item of $65,899.96 for 1905 to 1913. In any event, this amount, if allowable, would be offset by a like amount under the Act of August 12, 1935, 49 Stat. 571, 596, since it was expended for the benefit of the plaintiff tribe. The balance of $2,520.49 was expended for the benefit of plaintiff tribe for miscellaneous employees and agency expenses subsequent to the fiscal year beginning July 1, 1912, without specific congressional appropriation. In these circumstances the amount would, if allowed, be offset by a like amount required under the act of 1935. *Blackfeet et al. Tribes of Indians* v. *United States*, 81 C. Cls. 101; *Crow Tribe* v. *United States*, 81 C. Cls. 238; *Shoshone Tribe of Indians* v. *United States*, 82 C. Cls. 23, 55–59, 93, 94; *Eastern or Emigrant Cherokees* v. *United States*, 82 C. Cls. 180; *Klamath et al. Tribes* v. *United States*, 85 C. Cls. 451. We find no language in Article 13 of the treaty of September 27, 1830, 7 Stat. 333, or the treaty of 1855, under which the defendant obligated itself to bear this expense.

The next item of plaintiff's claim is for $9,202.35 disbursed from plaintiff's funds for roads (finding 8). It is contended that this was an expense which the government was obligated to bear in the administration of the Atoka and Supplemental

agreements. For the reasons hereinbefore stated, under this phase of the case, this contention cannot be sustained. The amount was disbursed pursuant to authority of the acts of April 26, 1906, and March 7, 1928. Plaintiff is therefore not entitled to recover.

Plaintiff next seeks to recover $5,516.19 (finding 9), representing disbursements made from its funds for its benefit for investigating tribal warrants and claims, on the ground that the Atoka and Supplemental agreements ended the tribal authority and that, under those agreements, this expense was an obligation of the United States. This contention cannot be sustained for the reason that the Secretary had implied authority to incur and pay the expenses. Moreover, section 11 of the act of April 26, 1906, 34 Stat. 137, 141, provided in part as follows:

> That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants had been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds; * * *

The next claim of plaintiff is for $8,591.74 disbursed from its funds for pay of Indian police (finding 10). This amount was disbursed by the Secretary from plaintiff's funds during the years 1910 to 1913, inclusive, for a purpose which was for the benefit of plaintiff tribe but without specific appropriation by Congress. The amount of $7,311.49 was disbursed for the purpose mentioned prior to the fiscal year beginning July 1, 1912, which was prior to the *proviso* contained on page 531 of the Indian Appropriation Act of August 24,

1912, 37 Stat. 518, that no money should be expended from tribal funds without specific appropriation by Congress, except for certain purposes. And $1,280.25 was disbursed from plaintiff's funds during the fiscal year 1913 for a like purpose but without appropriation or specific authority of Congress. As to the amount of $7,311.49, we think the Secretary possessed implied authority under the rule announced in the *Creek case* to make the disbursement in connection with the administration and handling of the property and affairs of plaintiff. In any event, this amount and also the balance of $1,280.25 disbursed in 1913 would, since they were for a purpose beneficial to the tribe, constitute an offset under the act of 1935. Plaintiff is therefore not entitled to judgment on this item.

The next item of plaintiff's claim is for $251.82 (finding 11) which represents the amount disbursed by defendant from plaintiff's funds for the expense incident to sale of certain tribal buildings. Plaintiff bases its claim upon the ground that this was an expense which the defendant was obligated to bear under the Atoka and Supplemental agreements. In view of our conclusion that defendant did not in these agreements assume the expenses incident to their administration and the winding up of the affairs of the tribal government, plaintiff is not entitled to recover. This disbursement was authorized under section 15 of the act of April 26, 1906 (34 Stat. 137, 143) and the act of April 30, 1908 (35 Stat. 70, 71).

The next item for $138 (finding 12) represents disbursements for plaintiff's benefit to cover insurance premiums of plaintiff's Capitol building. Although this expenditure was not specifically appropriated by Congress, we think the Secretary had implied authority under the Atoka and Supplemental agreements to make the disbursement which was solely in the interest of plaintiff and for the purpose of conserving and protecting its property. *Creek Nation* v. *United States*, 78 Ct. Cls. 474. In that case at page 489, we said:

> Section 19 of the Curtis Act [June 28, 1898, 30 Stat. 495] changed only the manner in which the Creek tribal funds were to be disbursed. Neither that section nor

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> any other provisions of the act defines or limits in any way the purposes for which the tribal funds might be expended. These funds were no longer paid into the Creek National Treasury by the United States for the purpose of disbursement by the tribal authorities, but were retained in the Treasury of the United States to the credit of the tribe, and were disbursed by the Secretary of the Interior. The disbursements complained of were largely for the purposes identical with those for which the funds had been expended during the preceding years by the tribal authorities. Congress undoubtedly contemplated and intended that the tribal funds would continue to be expended in the future, as they had been in the past, for the benefit of the Creek Nation and its people. Consequently, we think that when Congress, by the provisions of section 19 of the Curtis Act, took away from the Creek tribal authorities the control which they had formerly exercised over the disbursement of their tribal funds and charged the Secretary of the Interior with the duty of disbursing the funds, without defining or limiting the purposes for which they might be expended, it, by clear and necessary implication, invested him with authority to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Creek Nation and promote the welfare and happiness of its citizens, subject to such limitations as Congress might subsequently impose.

In any event the amount, if allowable, would be subject to an offset in a like amount under the offset statute of 1935.

In the next claim plaintiff seeks to recover $500 (finding 13) representing a disbursement from plaintiff's funds for the cost of erecting a monument to Green McCurtain, late deceased Chief of the Choctaw Nation, which was provided for and authorized by the act of June 30, 1913. (38 Stat. 77, 97.) Plaintiff contends that although this expenditure was authorized by Congress, it was an unwarranted and illegal charge against its funds under the Atoka and Supplemental agreements. For the reasons heretofore given this contention cannot be sustained. This was not a taking of plaintiff's funds by the government for its own benefit or for the benefit of another, and Congress possessed plenary authority to direct the use of Indian funds for any purpose which it considered to be for their benefit. The

nature of the purpose of the expenditure and the extent of the benefit is a matter of policy resting solely with Congress. *Chickasaw Nation* v. *United States*, 87 Ct. Cls. 91, 94, 95; *Chippewa Indians* v. *United States*, 88 Ct. Cls. 1, 307 U. S. 1.

Plaintiff next claims $137,579, representing payments made to certain newly enrolled members of the plaintiff tribe (finding 14). It insists, first, that these payments were not authorized by, and were contrary to, the Atoka and Supplemental agreements, since such agreements provided only for an equal division of the lands and contemplated only that each member should receive land of the value of $1,041.28; second, that Congress was without authority in view of the provisions of the agreements to so use the tribal funds; and third, that the payments made during the fiscal years 1916 to 1924, inclusive, amounting to $112,388.15, were unauthorized and therefore illegal for the asserted reason that the provision for payments in lieu of allotments (p. 600) in the Appropriation Act of August 1, 1914 (38 Stat. 582, 600) applied only to such payments as were made during the fiscal year ending June 30, 1915. These contentions cannot be sustained.

The act of August 1, 1914, *supra*, p. 600, provided as follows:

> The Secretary of the Interior is hereby authorized to enroll on the proper respective rolls of the Five Civilized Tribes, as indicated, the persons enumerated in Senate Document Numbered Four hundred and seventy-eight, Sixty-third Congress, second session; *Provided*, That when so enrolled there shall be paid to each and every such person out of the funds in the Treasury of the United States to the credit of the respective tribe with which such person is enrolled the following sums in lieu of an allotment of land: * * * to each such person placed on the Choctaw * * * rolls, a sum equal to twice the appraised value of the allotment of such tribe as fixed by the Commission to the Five Civilized Tribes for allotment purposes: * * *.

This is a general provision and clearly was not limited to such payments as might be made in the fiscal year 1915. We think the quoted provision completely answers plaintiff's con-

tention, and that the claim is without merit. Obviously it was the intention of Congress to equalize, as far as could be done, the benefits which the members of the tribe would receive from the Indian lands, and inasmuch as these disbursements were made subsequent to the time the allotments had been made and subsequent to the time when all of the unalloted lands had been ordered sold, and most of which had been sold, it was the manifest purpose of Congress to do justice to the Indians by making to them these payments of money instead of lands in order that they might receive full measure in value of what they would then have possessed had they theretofore received allotments. The appraised value of the allotments determined the basis of the amount they were to receive. It is clear that Congress possessed the authority to do what was done. *Chickasaw Nation* v. *United States*, *supra; Chippewa Indians* v. *United States*, *supra.*

Plaintiff next claims $201.56 disbursed from its funds to cover the expense of making payments to equalize allotments (finding 15), on the ground that while no claim is made for the payments made in order to equalize allotments the expense of so doing was a proper charge against the government under the provision of the Atoka agreement that each allottee would be put in possession of his allotment without expense to him. The provision relied upon is not applicable to this disbursement. This was a general expense incident to making the payments for the purpose of equalizing allotments. The provision relied upon only contemplated that of the hundreds of allottees the government would see to it, as a matter between the government and each individual allottee, that he should be put in possession of the particular tract allotted to him, so that one Indian would not get an allotment made to another, and to bear whatever expense that might be necessary for that purpose. No recovery can be had on this item. The expense was one properly payable under the Atoka and Supplemental agreements, and, in addition, since the disbursement was made prior to the act of August 24, 1912, 37 Stat. 518, 531, the Secretary of the Interior had implied authority to make it. *Creek case*, 78 C. Cls. 474.

Plaintiff next claims $1,089.60 disbursed from 1920 to 1929, from the joint account for medical attention (finding 16).

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The right to judgment for this amount is based solely upon the ground that Congress did not give authority and make an appropriation therefor, and therefore under the *proviso* of the act of August 24, 1912 (37 Stat. 518), at p. 531, that "* * * no moneys shall be expended from the tribal funds * * * without specific appropriation by Congress * * *," the amount is recoverable. This item was a disbursement from tribal funds for the direct benefit of the tribe, and, if allowed, would for the reasons hereinbefore given be subject to an offset in a like amount under the provisions of the offset statute of 1935. In the final analysis the offset statute of August 12, 1935, 49 Stat. 571, controls here over the provision above quoted from the act of 1912. The result must be the same as it would be if this disbursement had been made from public funds and defendant was now asserting it as an offset under the act of 1935 against an amount otherwise due plaintiff.

Plaintiff next seeks to recover $38,416.27 disbursed for the purposes and under the circumstances set forth in finding 17. Plaintiff contends, first, that this was an expense which the defendant was obligated to bear under the Supplemental Atoka agreement, and second, in the alternative, that $916.27 of the disbursement was without specific authority or appropriation by Congress. The first contention cannot be sustained for the reason, as we have held, that the agreements contemplated and intended that such expense would be borne by plaintiff's funds. To the extent, therefore, of the disbursements made prior to the fiscal year 1913, the Secretary had express and implied authority to make them. The excess was a disbursement for the benefit of plaintiff and, if judgment should be given therefor, it would be offset by a like amount under the act of 1935. The claim is therefore denied.

Plaintiff next seeks to recover $5,439.44 disbursed from its funds for expenses of the office of the Supervisor of Mines on plaintiff's lands (finding 18). This disbursement was made prior to the fiscal year 1913, and under the decision in the *Creek* case the Secretary possessed implied authority to make it. In any event it was an expenditure for the benefit of plaintiff rather than for the government and judg-

ment may not be entered therefor under the offset act of 1935.

Plaintiff next seeks judgment for $12,117.72 (finding 19) made up of disbursements of $8,186.68 for insurance on sanitarium, $297.25 for miscellaneous hospital employees, and $3,633.79 for roads and grounds. Plaintiff is not entitled to judgment for this item for the reason that authority was given for the disbursement for roads and grounds by the act of March 2, 1917 (39 Stat. 969), and for the reason that the amounts were disbursed solely for the benefit of plaintiff tribe.

The next amount sought to be recovered is $22,499.33 disbursed in 1911 and 1912 for expenses incident to appraising timber (finding 20). Plaintiff cannot recover on this item for several reasons. First, no agreement between plaintiff and the defendant imposed upon the latter the obligation of this expense which was in the interest and benefit of plaintiff. Second, the disbursement was made prior to 1913 and under the Curtis Act the Secretary possessed implied authority therefor since it was considered necessary in plaintiff's interest and the same was made in connection with and as a part of a duty specifically required of him under the Supplemental agreement. *Creek Nation* v. *United States*, *supra.* Third, the expense was authorized and appropriated for in a reimbursable appropriation in the act of March 4, 1911 (36 Stat. 1289), at p. 1309, as follows:

> Administration of affairs of the Five Civilized Tribes: For expense of administration of affairs of the Five Civilized Tribes, Oklahoma, in the completion of the work heretofore required by law to be done by the Commissioner to the Five Civilized Tribes, including salaries of employees and expenses incident to the selling of the unallotted lands of the Five Civilized Tribes, and in the reappraisement and selling of the unallotted timber lands of the Choctaw Nation and the timber thereon; the amount appropriated to be reimbursable from the proceeds of the sales of said lands and timber, thirty thousand dollars.

Plaintiff next seeks to recover $15,457.32 disbursed from its funds in 1908 to 1912, inclusive, pursuant to and under the authority of section 7 of the act of May 29, 1908

(finding 21). This section (35 Stat. 444, 446) provided as follows:

> That in addition to the towns heretofore segregated, surveyed, and scheduled in accordance with law, the Secretary of the Interior be, and he is hereby, authorized to segregate and survey within that part of the territory of the Choctaw and Chickasaw nations, State of Oklahoma, heretofore segregated as coal and asphalt land, such other towns, parts of towns, or town lots, as are now in existence, or which he may deem it desirable to establish. He shall cause the surface of the lots in such towns or parts of towns to be appraised, scheduled, and sold at the rates, on the terms, and with the same character of estate as is provided in section twenty-nine of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes at Large, page four hundred and ninety-five), under regulations to be prescribed by him. That the provisions of section thirteen of the Act of Congress approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven), shall not apply to town lots appraised and sold as provided herein. That all expenses incurred in surveying, platting, and selling the lots in any town or parts of towns shall be paid from the proceeds of the sale of town lots of the nation in which such town is situate.

Plaintiff bases its right to recover the amount of this disbursement upon the provision in the Atoka agreement (Sec. 29, act of June 28, 1898, 30 Stat. 495, 508–9) "That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading, appraising, and allotting the lands, or for appraising and disposing of the town lots *as herein provided*," [italics supplied], and contends that the terms of this agreement "were violated when the Secretary disbursed Choctaw funds to defray this expense under the authorization contained in the act of May 29, 1908, *supra*." If the quoted provision of the agreement is applicable to the towns and town lots on the segregated coal and asphalt land as specified in the act of 1908, also quoted, then plaintiff is entitled to recover on this item for the reason that the government

cannot escape responsibility for an obligation solemnly assumed by using plaintiff's funds to discharge it. However, we are of opinion that the provision of the Atoka agreement relied upon is not applicable to the towns, parts of towns, and town lots provided for in the act of 1908 when considered in connection with other provisions of the Atoka agreement with reference to town sites and lots; the act of May 31, 1900 (31 Stat. 221, 237–8), and the Supplemental Atoka agreement approved July 1, 1902, 32 Stat. 641. The only basis on which plaintiff connects the provisions of section 7 of the act of 1908 with the town lots mentioned in the Atoka agreement, and which is, we think, the only basis for any connection, is the fact that the 1908 act relates to town sites and town lots. But this is not enough. The towns, parts of towns, and lots specified in the 1908 act were not the town sites and lots contemplated and referred to by the Atoka agreement. This agreement provided with reference to town sites, that "there shall be appointed a commission for each of the two nations. * * * Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, *where towns are now located in the nation* for which said commission is appointed." [Italics supplied.] The agreement then provided that "When said towns are so laid out, each lot," together with improvements, should be appraised and sold under certain conditions and on certain terms. Then followed the provision that no charge or claim would be made for the expenses of surveying and platting the town sites, or for appraising and selling the town lots "as herein provided." From this it seems clear that the defendant only assumed the obligation of paying the expenses incident to sale of the town lots in towns then located on the reservation and laid out, surveyed, and platted by the Commission. We find nothing in the act of 1900 or the Supplemental agreement that amended, enlarged, or extended the expense provision of the original Atoka agreement. For these reasons plaintiff is not entitled to recover.

The next claim of plaintiff is for $158,038.05 made up, first, of $147,491.36 as its share of interest at the rate of 5 percent per annum alleged to have become due, not as interest but

as a part of just compensation, but which was not paid on a judgment against the defendant for $606,936.08 entered by this court in the case of *United States* v. *The Choctaw Nation et al.*, 38 C. Cls. 558, affirmed 193 U. S. 115; and, second, of $10,546.69, the alleged deficiency in the payment of its share of the $606,936.08 (finding 22).

Plaintiff contends as to the first amount that its land was taken by the United States and allotted to the Chickasaw freedmen (former slaves of the tribe) who were not entitled to such land as a matter of right or under any treaty or agreement; that when this court and the Supreme Court held that the freedmen were not entitled to allotments independently of the Supplemental Atoka agreement dated March 21, 1902, ratified July 1, 1902 (32 Stat. 641, 649–651), in which provision was made for the determination of the question by this court, it became entitled to just compensation for such land which should have included an amount measured by interest at 5 percent from the date of the decision of the Supreme Court on February 23, 1904, to date of appropriation, June 25, 1910; that the value of the land fixed at the time of allotment subsequent to the agreement of 1902, *supra*, in the amount of $606,936.08, without the addition of a further sum measured by interest did not amount to just compensation for the alleged taking. In support of these contentions, plaintiff relies upon the rule announced and applied in *Untied States* v. *Creek Nation*, 295 U. S. 103, 111, in which the court said:

> But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the Act of 1889, and other statutes show that five percent per annum is a reasonable rate as between the parties here.

The facts and circumstances in the *Creek* case are not comparable to the facts in the present case. The *Creek* case is therefore not controlling here. Plaintiff cannot recover the amount claimed solely as interest, for interest is not allowable

under section 177 of the Judicial Code as amended (U. S. Code 284, Tit. 28). Nor is interest allowable under section 1090 Revised Statutes (226 U. S. Code, Tit. 31) as the facts do not show either compliance by plaintiff with the provisions thereof, or that any interest would be due thereunder.

We think in view of the fact set forth in finding 22 and the circumstances hereinafter disclosed that plaintiff is not entitled to recover on this item. The claim arises under the agreement dated March 21, 1902, and ratified by the act of July 1, 1902, between plaintiff and the defendant represented by the Commission to the Five Civilized Tribes. Section 11 of this agreement provided in part that "There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to 40 acres of the average allottable land of the Choctaw and Chickasaw nations; * * *." Section 25 provided in part that "If any citizen or freedman of the Choctaw and Chickasaw nations shall not have selected his allotment within twelve months after the date of the opening of said land offices in said nations, if not herein otherwise provided, and provided that twelve months shall have elapsed from the date of the approval of his enrollment by the Secretary of the Interior, then the Commission to the Five Civilized Tribes may immediately proceed to select an allotment, * * *"

Section 27 provided in part that "The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats. 495), and the act of Congress approved May 31, 1900 (31 Stats. 221), except as herein otherwise provided."

The Choctaw Nation had in 1883 by appropriate legislation adopted the freedmen of its tribe, but the Chickasaw Nation, having first adopted its freedmen as members of the tribe,

repealed such legislation and refused to adopt the freedmen prior to ratification by Congress of the action first taken. Congress subsequently attempted to ratify the first action. The amount claimed under the item now in question arose out of land allotted only to Chickasaw freedmen. At the time of the agreement of 1902 the government insisted that the Chickasaw freedmen had been adopted and were entitled to allotments, and the Indians insisted that they had not been adopted and were not entitled to allotments. As above stated, it was agreed that the Chickasaw freedmen should be given allotments the same as the Choctaw freedmen, and that the question whether the Chickasaw freedmen had been adopted by the Chickasaw Nation and were entitled to such allotment independent of such agreement of 1902 would be submitted to this court for decision with the right of appeal to the Supreme Court. Therefore, sections 36, 37, and 40, were inserted in the agreement as follows:

> 36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.
>
> 37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.
>
> 40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event

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> that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

Sections 38 and 39 related to service of process and the employment and payment of counsel, and are not material here. In the suit brought here, under the above provisions, this court held in *United States* v. *The Choctaw Nation, et al.*, 38 C. Cls. 558, that the Chickasaw Nation had not adopted its freedmen; that the Chickasaw freedmen having voluntarily remained in the Chickasaw country, their status was as defined by the treaty of 1866; that their relation to the Choctaw and Chickasaw nations was the same as that of citizens of the United States residing there; and that they had no right or interest, independent of the agreement of 1902, *supra*, in any property held in common by members of the Choctaw or Chickasaw nations, or in the funds of such nations in the hands of the United States. The court, at page 570, entered its decree accordingly on May 25, 1903, the language of which was in part as follows:

> And it is further ordered that upon the coming in of the roll and appraisal to be made by the Dawes Commission, as referred to in the said statute, the defendants, the Choctaw and Chickasaw nations, have leave to apply for an additional decree to be entered at the foot of this decree determining the amount which shall be paid and allowed by the United States to the said Choctaw and

> Chickasaw nations, as directed by said statute; and that the complainant, the United States, be at the same time heard in regard to such amount for which judgment shall be rendered against the United States.

This decree was affirmed February 23, 1904, 193 U. S. 115. After completion of the allotment rolls and the appraisal of allotments to the freedmen as provided in the 1902 agreement, this court heard the parties further as to the amount of the award for which judgment should be entered against the United States. As a result a judgment was entered January 24, 1910, for $606,936.08, being the value of 4,663 allotments as shown by the rolls to be the number of Chickasaw freedmen entitled to allotments at $130.16 each, as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment. Subsequently, on May 9, 1910, this court entered a supplemental decree in which it was provided that the amount of $606,936.08 should be subject to a deduction of $130.16 for each freedman enrolled by the Commission to the Five Civilized Tribes found to have been improperly enrolled, or who failed to receive an allotment, or money in lieu thereof, such deduction not to exceed a total of $13,000. No appeal was taken from this judgment, and no additional amount was asked by plaintiff.

Accordingly, Congress, by the act of June 25, 1910, 36 Stat. 774, 807, 808, appropriated the sum of $606,936.08, or so much thereof as might be necessary, to pay the judgment of this court. The judgment was paid by crediting the amount due to the Choctaw and Chickasaw nations in the proportion of three-fourths to plaintiff and one-fourth to the Chickasaws, and the amount was subsequently expended or disbursed, in whole or in part, for their benefit.

From the above, it seems clear that the claim for an additional amount measured by interest now being pressed is an integral part of a claim heretofore adjudicated on the merits by this court and the Supreme Court, and that it is therefore expressly excluded from the jurisdiction of this court in this case by section 1 of the jurisdictional act under which this suit was brought. *Cherokee Nation* v. *United States*, 82 C. Cls. 456, 474. This act confers upon

this court jurisdiction to adjudicate only those claims which "have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

But even if plaintiff is not precluded by the former adjudication and the terms of the jurisdictional act, we are nevertheless of opinion that plaintiff is not entitled to recover for the reason that the amount awarded by this court and paid was fixed and determined strictly in accordance with the agreement of the parties in section 40 of the agreement of 1902 in which it was stipulated that if it should be held that the tribes were entitled to recover, the award to the Indians should be "*for the value of the lands* so allotted to the Chickasaw freedmen *as ascertained by the appraisal thereof* made by the Commission to the Five Civilized Tribes for the purpose of allotment," [italics supplied], and that the decree of the court should take the place of the lands, and should be in *full satisfaction of all claims* by the Choctaw and Chickasaw nations against the United States. See section 178 of the Judicial Code (section 285, U. S. Code, Tit. 28). In the absence of a waiver of the provisions of the agreement of 1902, there exists no authority in the court to adjudicate the matter further. *Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians* v. *United States*, 81 C. Cls. 79, affirmed 296 U. S. 244.

Plaintiff is not entitled to recover the second item of $10,546.69 of this claim. *Choctaw Nation* v. *United States*, 83 Ct. Cls. 140.

The next claim of plaintiff is for $517,366.52. The facts with reference to the payments and disbursements totaling this amount are set forth in finding 23. We are of opinion that plaintiff is not entitled to recover the amounts here claimed for the reasons, first, since the payments totaling the amount in question were made to the Choctaw National Treasurer subsequent to the passage of the Curtis Act of June 28, 1898, and were paid to such Treasurer for the nation pursuant to and in satisfaction of treaty obligations and were not amounts paid or intended "for disbursements" as therein contemplated, such payments were not in viola-

tion of section 19 of the Curtis Act; and, second, that the amounts paid to the Choctaw National Treasurer were authorized by Congress in various appropriation acts, which acts, even if in conflict with section 19 of the Curtis Act, were enacted within the exercise of the plenary power of Congress over the affairs, property, and funds of the Indian tribes for their benefit.

We think section 19 of the Curtis Act related only to moneys intended for disbursement per capita or for the purpose of carrying out agreements or acts of Congress concerning matters over which jurisdiction was taken from the tribal government and vested in the Secretary of the Interior when the authority of such tribal government was restricted and, as so limited, continued by the Atoka agreement and subsequent acts of Congress. Section 19 of the Curtis Act is as follows:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof *for disbursement*, but payments of all sums to *members of said tribes* shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics ours.]

We think the words "all sums" as used in the second clause of the section relate to the same "moneys" mentioned in the first. The words "payments * * * to members of said tribes" as used in the second clause has the same meaning as the word "disbursement" in the first clause. In other words, it appears that the restriction against payments intended for disbursement in the first clause is expressly carried over and rephrased in the second clause. For this reason we think the first clause was intended to change the method of "making payments of all sums to members of said tribes;" and that the second clause was intended to supply a new method and directed that "payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him."

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Section 3 of the jurisdictional act provides that any payment which may have been made by the United States upon any claim thereunder against the United States shall not operate as an estoppel but may be pleaded as an offset, and the act of 1935 provides that any gratuitous payment for the benefit of the tribe shall be offset by the court against any claim made by such tribe. Since the amount involved was paid by the defendant pursuant to and in accordance with treaty obligations assumed, it cannot be made to pay the amount the second time. Since the amounts so paid to the nation were made in strict compliance with the treaty and were for the benefit of the tribe, they would, if allowable, be subject to an offset by a like amount under the act of 1935. Although this claim was not asserted in the original or amended petitions, but was first asserted in a second amended petition filed more than five years after the approval of the jurisdictional act contrary to the provisions of section 2 of such act (*United States* v. *Seminole Nation*, 299 U. S. 417), this defect was remedied by the act of August 16, 1937, 50 Stat. 650.

The next item of plaintiff's claim is for $46,866.45 (finding 24) which plaintiff contends was disbursed from its funds for unauthorized and illegal purposes. In support of this claim it is contended that the disbursements were made to cover expenses which the tribal government did not have power or authority to incur and as to which the tribal government, in the years in which the disbursements were made, was prohibited by agreements and acts of Congress from incurring.

The record does not support plaintiff's contention. On the contrary the record shows, first, that practically all these disbursements were made in the years mentioned to pay expenses incurred by the tribal government at a time when it had authority to incur such expenses, and for which tribal warrants were issued, and that they were not paid until the years mentioned for the reason that time was required to investigate the validity of the warrants issued by the tribal government and whether they were valid and binding obligations of the nation; and, second, that the disbursements made to pay any

expense that may have arisen at the time when the authority of the tribal government was limited under the Atoka agreement were for payment of expenses properly chargeable to plaintiff tribe and for which the United States had assumed no obligation, and for which it was not liable. In addition, the Secretary had implied authority to pay from plaintiff's funds $45,116.38 of the total disbursements made during the years 1910 to 1912, inclusive. *Creek Nation* v. *United States*, 78 C. Cls. 474, 489. Finally it is shown by the acts of March 3, 1899, 30 Stat. 1074, 1099, and April 26, 1906, 34 Stat. 137, 141, that the Secretary had express authority to make the disbursements. The act of 1899 provided for payment of all outstanding Choctaw warrants and the act of 1906 authorized the Secretary to investigate and pay tribal warrants. Plaintiff is therefore not entitled to recover on this item.

The next claim of plaintiff is for $978,787.31 and interest of $1,233,907.40 to June 30, 1935, totaling $2,212,694.71, for alleged illegal disbursements of the principal of four interest-bearing trust funds (findings 25 and 27). It is alleged that these trust funds, known as the "Choctaw School Fund," the "Choctaw Orphan Fund," the "Choctaw General Fund," and the "Choctaw 3% Fund," were provided and set up by treaties and acts of Congress and that the Secretary of the Interior violated such treaties and acts of Congress when he made disbursements from and depleted such trust funds, for the reason that Congress did not at any time *specifically* authorize the disbursements made from such funds.

The authority of the United States to charge plaintiff with the expenses mentioned for the payment of which certain of these trust funds were used, and the authorization of Congress for and the authority of the Secretary of the Interior to make such disbursements have been hereinbefore and are hereafter discussed and decided under the heading for which each disbursement was made. Plaintiff contends in support of this claim here made that while Congress authorized the expenditure of its money for the purposes for which the Secretary used these trust funds, Congress did not *specifically* authorize disbursements from these trust funds and, therefore, the amounts paid out must be restored

under treaty provisions, and that if it should be held that although allowable the total would be subject to an offset in a like amount on the ground that the funds were used for the plaintiff's benefit, interest to date of judgment is nevertheless recoverable.

Plaintiff insists that the principal of the four trust funds mentioned in finding 25 was, prior to the passage of the Curtis Act of 1898, definitely restricted both by treaty stipulation and authority of law from disbursement for any purpose; that the legislation contained in the Curtis Act had, for its effect, the ultimate capitalization of these trust funds and the payment thereof per capita to members of the tribe, with the provision that this should not be done until within one year after the tribal government should cease; that section 29 of the Curtis Act ratifying the Atoka agreement distinctly provided for the continuation of the tribal government until March 4, 1906, and that since subsequent legislation continued the limited tribal government in existence to the present date, any disbursement from the principal of these trust funds was illegal and unauthorized. Plaintiff concedes that Congress under its broad plenary power over the affairs, property, and funds of the Indian tribes possessed authority insofar as the matter of administration only was concerned to legally modify existing treaty provisions and legislation so as to make the principal of these trust funds available for distribution (*Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, affirmed 307 U. S. 1), but insists that in order for Congress to do so it must act specifically, and specifically name or designate the fund from which the disbursements for the benefit of the Indians are to be made, and that, in the case of disbursements from the principal of these trust funds, the Congress did not so specifically act. The *right* and *authority* of the Congress to charge plaintiff with the disbursements from these trust funds are elsewhere challenged and disposed of.

The contentions now pressed cannot be sustained. The Curtis Act and subsequent acts of Congress were directed to the winding up of the administration of the affairs of the Five Civilized Tribes. *United States* v. *Seminole Nation*,

supra. In the Atoka agreement it was provided that all the funds of plaintiff invested, in lieu of investment, treaty funds, or otherwise, then held by the defendant in trust for the tribe should be capitalized within one year after the tribal government should cease, so far as same might be legally done, and be appropriated and paid by some officer of the United States, appointed for that purpose, to the tribe per capita to aid and assist them in improving their homes and lands. Congress possessed authority, as conceded, to direct the use of these trust funds for any purpose which it deemed for the best interest of the tribe, even though such use might not be in accordance with provisions of a prior treaty, agreement, or act of Congress. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 554–567; *United States* v. *Seminole Nation*, *supra; Chippewa Indians of Minnesota* v. *United States*, *supra.* We think the acts of Congress under which the disbursements herein were made were sufficiently specific to authorize such disbursements to be made from these trust funds.

With reference to the "Choctaw School Fund," plaintiff contends that the principal of $49,472.70 of this amount was illegally disbursed without specific authority of Congress. The evidence shows that this amount was disbursed under Congressional authority for the purpose of making per capita payments. With reference to the "Choctaw Orphan Fund" of $39,710.67, the evidence shows that this amount was likewise disbursed in making per capita payments. It is clear, therefore, that these two trust funds were disbursed for purposes specified in the Atoka agreement, i. e., for per capita payments. These payments were made pursuant to the act of May 18, 1916, 39 Stat. 123, 146, which authorized such payments to be made "out of any moneys belonging to said tribes in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the [Secretary of the] Interior." The provision in the Atoka agreement that the trust fund should be capitalized within one year after the tribal government should cease, and be appropriated and paid per capita, did not remove from Congress its plenary power, notwithstanding the lim-

ited tribal governments had not completely ceased to exist, to capitalize such funds at an earlier date, and to make per capita payments therefrom at an earlier date. Moreover, the period mentioned in the Atoka agreement for the continuation of the limited tribal agreement ended prior to many of these disbursements. Thereafter it existed only by the will of Congress, and its existence did not deprive Congress of authority to legislate with reference to these funds for the benefit of the tribe.

With reference to the "Choctaw General Fund," it appears from the first tabulation of finding 25 that $77,149.26 of this fund was paid out in settlement of the Choctaw warrants authorized to be paid by the act of March 3, 1899, 30 Stat. 1099, and the act of April 28, 1904, 33 Stat. 1664. The acts of 1899 and 1904 directed disbursement for this purpose "from the funds in the Treasury belonging to the Choctaw Nation." This was clearly such a fund. In his annual report to Congress for 1901, the Secretary of the Interior at page 219 specifically called the attention of Congress to the fact that Choctaw warrants were being paid "out of the Choctaw moneys held in trust by the United States." The record further shows that in 1898 the Choctaw National Council passed an act requesting that the Choctaw warrants mentioned be paid out of their trust funds (Laws of Choctaw Nation for 1898, Supp. Rept., of Secretary of the Interior). Thereafter Congress continued to appropriate for the payments for plaintiff's benefit in the same language as was used in the act of 1899, after having been advised by the Secretary of the Interior that an act providing for payments out of funds of the tribe in the Treasury had been, and was being, construed as authority that *any* funds of the tribe in the Treasury of the United States were available for such payments. We are, therefore, of opinion that the direction by Congress to the Secretary to make payments "from funds in the Treasury belonging to the Choctaw Nation," and "from any funds" was sufficiently specific to authorize the Secretary to make such payments out of the trust funds. If Congress, after its attention had been called to the matter, had intended that

payments already made, or those thereafter to be made under similar appropriations should not have been, or be, made from trust funds, it would have so specified.

With reference to the disbursement of $75,000 from the "General Trust Fund" to the heirs of Albert Pike (finding 25 (b)), it is shown that this payment was made pursuant to the act of March 3, 1901, 31 Stat. 1058, 1078, which appropriated this amount and directed its payment to the heirs of Albert Pike "out of any funds in the Treasury of the United States belonging to the Choctaw Nation." The payment out of trust funds was, therefore, legal.

With reference to the payment of $346,364.74 to Mansfield, McMurray and Cornish, it is shown that this payment was made for legal services rendered the tribe, and fixed by the Citizenship Court created by sections 32 and 33 of the act of July 1, 1902, 32 Stat. 641, 647–649, in matters coming before that court and pursuant to the provision in the act of March 3, 1903, 32 Stat. 982, 995. The last-mentioned act provided and directed the payment of fees so fixed for such compensation "out of any funds in the Treasury belonging to said nations." Payment of this amount from the general trust fund was, therefore, legal and proper. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, affirmed 307 U. S. 1.

With reference to the "Choctaw 3% Fund" of $390,257.92, it appears that $233,047.76 thereof was used in making per capita payments. For the reasons hereinabove stated these payments were legal. They were authorized to be made out of *any* of plaintiff's funds. The balance of this fund was used for certain of the purposes stated in the tabulation in finding 3. We have hereinbefore held that these payments were properly chargeable to plaintiff, and plaintiff now contends, only, that they are recoverable on the ground that Congress did not specifically authorize the use of its trust funds for those purposes. For the reasons hereinbefore stated under this claim, these payments were sufficiently authorized by Congress to be made out of this trust fund. They were made pursuant to authority and direction of Congress that they be paid "out of any moneys" of the tribe, or

"the funds" of the tribe, or "out of any funds" of the tribe, or "from the tribal funds" of the tribe. Plaintiff's claim for interest on the disbursements from these trust funds is hereinafter discussed.

The next claim of plaintiff is for $63,423.11, representing the difference between interest at 5 and at 3 percent per annum from January 1, 1908, on the amount of the "Choctaw 3% Fund" (finding 26). This fund was the continuation of an interest-bearing fund provided for and set up under Art. 13 of a treaty of June 22, 1855, 11 Stat. 611, which provided that interest should be paid on the fund therein provided at the rate of not less than 5 percent per annum as follows:

> And the funds now held in trust by the United States for the benefit of the Choctaws under former treaties, or otherwise, shall continue to be so held; together with the sum of five hundred thousand dollars out of the amount payable to them under articles eighth and tenth of this agreement, and also whatever balance shall remain, if any, of the amount that shall be allowed the Choctaws, by the Senate, under the twelfth article hereof, after satisfying the just liabilities of the tribe. The sums so to be held in trust shall constitute a general Choctaw fund, yielding an annual interest of not less than five per centum.

In the appropriation act of March 1, 1907, 34 Stat. 1015, at page 1027, the Congress in making an appropriation to fulfill the obligations of the government under the Choctaw treaty of 1855, *supra*, stated as follows:

> For interest on three hundred and ninety thousand two hundred and fifty-seven dollars and ninety-two cents [$390,257.92], at five per centum per annum, for education, support of the government, and other beneficial purposes, under the direction of the general council of the Choctaws, in conformity with the provisions contained in the ninth and thirteenth articles of treaty of January twentieth, eighteen hundred and twenty-five [January 20, 1855], and treaty of June twenty-second, eighteen hundred and fifty-five [June 22, 1855], nineteen thousand five hundred and twelve dollars and eighty-nine cents [$19,512.89];

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> That the Secretary of the Treasury is hereby authorized and directed to place upon the books of the Treasury to the credit of the Choctaw tribe of Indians the sum of three hundred and ninety thousand two hundred and fifty-seven dollars and ninety-two cents [$390,257.92], balance due said tribe under articles ten and thirteen of the treaty of June twenty-second, eighteen hundred and fifty-five [June 22, 1855], (Eleventh Statutes at Large, six hundred and eleven) [11 Stat. 611], and the same shall draw interest at three per centum per annum.

At the time of the enactment of this Act the fund of $390,257.92 was already a trust fund under the treaty of 1855 bearing interest at 5 percent thereunder.

The defendant contends that the reduction of interest from 5 percent, as provided in the treaty, to 3 percent, as mentioned in the Act of 1907, was a proper exercise by Congress of its plenary power over the property and funds of the Indian tribe; that authority of Congress is unlimited so long as it is exercised for the benefit of the tribe. But it is clearly established that the government cannot use for the benefit of another or for its own benefit, the funds of the tribe or the amounts due them by the government under an obligation solemnly assumed, and it has been uniformly held that where the government assumes a treaty obligation to make a definite payment it must do so. In this instance the government by reducing the interest rate specified and agreed to in the treaty of 1855 failed to fulfill its obligation thereunder, and, thereby, received the use of the funds of plaintiff represented by the difference between interest at the rate of 5 and of 3 percent for its own benefit subsequent to January 1, 1908.

In the case of *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, the court had before it the question of the constitutional power of Congress by an act to abrogate, change, or modify a provision in a treaty or agreement with Indian tribes with respect to the handling, administration, and disposition of their property and funds for their benefit. The court held that Congress possessed such power and that under the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, this might be done by legislation. The court said at

page 565 that "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the Judicial Department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U. S. 581, 600, the legislative power might pass laws in *conflict* with treaties made with the Indians." The court further stated at page 566 that "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."

Neither the record in this case nor the act of 1907 show that the reduction in the rate of interest from that stipulated in the treaty was brought about or based upon any consideration of necessity of the government or the Indians. The obligation which the government had assumed under the treaty of 1855 was based upon a valuable consideration passing from the plaintiff to the government. This payment of interest at 5 percent was one of the promises made by the government in exchange for valuable rights granted by the Indian tribe. It may not, therefore, be escaped without adequate justification, for, as was said by the court in *Choate* v. *Trapp*, 224, U. S. 665, 671, "But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Reichert* v. *Felps*, 6 Wall. 160." And, further at page 674, the court said "It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute." In *Lane et al.* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113, the court, in answer to the contention of the government that property of the Indians, in consequence of their being wards of the United States, was

subject to such regulation as Congress might prescribe, stated that "Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation." In *Chippewa Indians of Minnesota et al.* v. *United States*, 301 U. S. 358, 375, the court said: "Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith and for their welfare, show that this power is subject to limitations and does not enable the government to give the lands of one tribe or band to another or deal with them as its own. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113; *United States* v. *Creek Nation*, 295 U. S. 103, 109–110; *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 497." Plaintiff is entitled to judgment for this item of $63,423.11.

The next claim of plaintiff is for interest at 5 percent per annum on the total amount of $2,422,383.01 representing alleged illegal disbursements from its interest and non-interest-bearing funds.

If plaintiff were entitled to recover on any or all of the various items making up its total claim, it would only be entitled to recover interest on those amounts disbursed from interest-bearing funds from the date of such disbursements. The amount of interest on disbursements from interest-bearing funds, computed to June 30, 1935, is $1,233,907.40 (finding 27). But as we have held that plaintiff is not entitled to recover on any of such items, it is not entitled to recover any interest.

This leaves for decision the final claim which presents the question whether interest is recoverable on the item of $63,423.11 (finding 26). Interest, as such, or as damages, is not payable on such claim under section 177 of the Judicial Code, and the provision of Art. 13 of the treaty of 1855 did not require that interest therein provided should become a part of the trust fund. Inasmuch, therefore, as plaintiff's right to recover this amount grows out of a contract obliga-

tion of the government and results from its failure to fulfill its obligation in that regard, no additional amount measured by interest is allowable as a part of just compensation for a taking of property under the Fifth Amendment. Failure to pay the stipulated interest was not a taking of property under the Constitution.

OFFSETS FOR GRATUITOUS EXPENDITURES

The gratuitous expenditures made by the defendant from public funds for the benefit of the plaintiff tribe and without obligation therefor under any treaty or agreement, and which were expended for such purpose under other than treaty or contractual appropriations, are set forth in findings 28 to 40 as disclosed by the record and the accounting reports for the period 1806 to 1934, inclusive. The total of these gratuitous expenditures, which we think the government had not obligated itself to bear under any treaty or agreement with plaintiff, is $3,825,152.26 (finding 40).

As shown under the various offset findings, plaintiff concedes that if any offset for gratuitous expenditures is proper under the offset statute of August 12, 1935, 49 Stat. 571, 596, the amount of $63,450.26 expended gratuitously subsequent to the treaty dated April 27, 1855, and ratified June 22, 1855 (11 Stat. 611), is a proper offset. The remaining gratuitous expenditures are objected to by plaintiff for the reasons set forth under each finding and which need not be repeated here. The grounds of plaintiff's objections to the offsets are (1) that the act of August 12, 1935, authorizing the defendant to plead gratuities as offsets is unconstitutional because it is retroactive legislation and therefore deprives plaintiff of vested rights by taking from the court its power to administer justice between the parties and attempts to apply an arbitrary rule to the decision of a matter over which the court was theretofore given exclusive jurisdiction by the jurisdictional act of June 7, 1924, 43 Stat. 537; (2) that all expenditures made prior to the date on which plaintiff's first claim arose are not proper offsets; (3) that many of the disbursements set forth as gratuity expenditures were expenditures made pursuant to obligations assumed by the United States under

stipulations of treaties and agreements and are therefore not proper offsets; and (4) that many of the disbursements represent expenditures made for the benefit of individual Indians or a limited class rather than for the benefit of the tribe as a whole and are therefore not proper offsets.

The claim of unconstitutionality is without merit. *DeGroot* v. *United States*, 5 Wall. 419; *Gordon* v. *United States*, 7 Wall. 188; *Ex Parte Russell*, 13 Wall. 664; *United States* v. *Gleeson*, 124 U. S. 255; *Johnson* v. *United States*, 160 U. S. 546; *United States* v. *Heinszen*, 206 U. S. 370, 387; *Thurston* v. *United States*, 232 U. S. 469; *Chase et al.* v. *United States*, 50 C. Cls. 293. Plaintiff had no vested right to sue the United States and Congress could at any time modify the remedy given. The jurisdictional act admitted no liability The act of 1935 did not limit the liability but was simply the exercise by Congress of its authority to charge plaintiff with such sums expended for its benefit as would constitute a charge on public funds. There is nothing in the act which deprives the court of any proper judicial function.

Plaintiff incorrectly interprets the act of August 12, 1935, when it claims that such act authorizes the offset only of gratuitous expenditures which were made subsequent to the date on which any of the allowed claims of plaintiff arose. The act plainly states that only those gratuitous expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claim or claims arose shall not be offset against the claim, or claims, asserted and allowed. It is therefore clear that the date of the law, treaty, or agreement, which gives plaintiff the right to the claim made, controls as to gratuitous expenditures that may be asserted by the defendant and allowed as offsets. It seems obvious that the controlling date of the gratuitous expenditures for the purpose of offsets is not the date on which the government acted or omitted to perform some duty which resulted in plaintiff being deprived of certain property or funds. A claim arises under a treaty, agreement, or act of Congress which confers the right to claim, rather than the act which took away the right. In this view, only

those expenditures made gratuitously and without obligation by the government for the benefit of plaintiff subsequent to the treaty dated June 22, 1855, which is the earliest treaty under which any claims are asserted by plaintiff, and those expenditures made after subsequent treaties and agreements, under which other claims are asserted by plaintiff, constitute proper offsets against such claim or claims. Therefore, the gratuitous expenditures made prior to the fiscal year ending June 30, 1855, and asserted by the defendant, as shown in findings 28, 29, and 30, may not, in whole or in part, be treated as offsets against any claim asserted by plaintiff in this case.

Plaintiff concedes offsets and gratuitous expenditures for its benefit subsequent to the fiscal year ending June 30, 1855, in the total amount of $63,450.26 (findings 31, 32, 33, 35, 36, and 38). This is in excess of the only claim of plaintiff which we have allowed in this case under finding 26 in the amount of $63,423.11, which arose under Art. 13 of the treaty of June 22, 1855. In these circumstances it is unnecessary to consider and discuss in detail the other objections made by plaintiff to certain of the gratuitous expenditures for the benefit of plaintiff tribe on the ground that they were expenditures for obligations assumed by the government under treaties and agreements or made for the benefit of the individual Indians rather than for the benefit of all the members of the tribes. These objections have been carefully considered and we believe them to be without merit. *Blackfeet et al. Tribes of Indians* v. *United States*, 81 C. Cls., 101; *The Crow Nation or Tribe of Indians of Montana* v. *United States*, 81 C. Cls. 238; *Eastern or Emigrant Cherokees* v. *United States*, 82 C. Cls. 180; *Shoshone Tribe of Indians* v. *United States*, 82 C. Cls. 23, 55–59, 93, 94; also 84 C. Cls. 641; *Klamath and Moadac Tribes of Indians* v. *United States*, 82 C. Cls. 699.

Plaintiff's petition is dismissed. It is so ordered.

WHITAKER, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

Syllabus

MANUFACTURERS TRUST COMPANY v. THE UNITED STATES

[No. 43829. Decided April 1, 1940. Plaintiff's motion for new trial overruled October 7, 1940]

On the Proofs

Income tax on profits from purchases and sales of silver bullion; transactions taxable separately; legal fees not an allowable deduction.—Plaintiff, a New York banking institution, in 1934 purchased silver bullion in the London market in eight purchases, and between December 3, 1935, and January 6, 1936, sold this silver in thirteen lots by separate sales; the first nine sales in December 1935, being made at a profit and the last four sales in January 1936 at prices below cost, and with certain expenses in connection with said transaction, including expenses for storage, transportation, and legal advice.

Held:

1. The profits on each sale, calculated upon the excess of receipts from such sale over the average cost of all the silver bullion, plus allowed expenses, were taxable under section 8 of the Silver Purchase Act of 1934.

2. The sales of silver bullion from December 3, 1935, through January 6, 1936, did not constitute the transfer of a single interest in silver bullion, upon which the tax could be calculated on the difference between the aggregate receipts and the total cost thereof, with deduction of allowable expenses, but were separate transactions upon which the tax, if any, should be calculated.

3. Congress may segregate the income or profit from a particular transaction and tax it separately, without making any provision with reference to losses sustained in other transactions, although they might be similar in their nature. *United States* v. *Hudson*, 299 U. S. 498.

4. The matter of deductions, credits, and allowances on an income tax is in the discretion of Congress.

5. The constitutional amendment (Article XVI) which authorized the levy of an income tax made it immaterial whether it was a direct tax or an indirect tax. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.

6. A tax levied upon property because of its ownership is direct, while a tax levied upon property because of its use is an excise duty or impost. *Brushaber*, *supra*.

7. The silver tax, levied upon the use made of the property, is an excise tax; and the application of it made in the instant case was constitutional.

8. The silver tax statute makes no reference to calendar or fiscal years, with regard to gains and losses.

9. The silver tax statute specifies definitely certain items of expense for which deductions may be made, and "charges in the nature of overhead" are specifically excluded.

10. "Legal fees," not being included in the deductions specifically set forth by the silver tax statute, are not allowable, whether or not "in the nature of overhead."

The Reporter's statement of the case:

Mr. Donald Marks for the plaintiff. *Baer & Marks* were on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a New York banking corporation with its principal office and place of business in New York City.

2. During the year 1934 plaintiff was the owner of approximately $13,000,000, face amount, of claims against German nationals, which claims were covered by the "Standstill Agreement" entered into by representatives of the various banks holding such claims and the representatives of the German debtors.

3. Claims covered by the "Standstill Agreement" consisted of dollar obligations of German banks and industrial corporations to American banks. According to the terms of the "Standstill Agreement," as renewed from year to year, such claims were subject to call by the creditors at any time, but not in excess of stipulated percentages of the face amount of the respective claims at any one time. Payment was to be made in registered marks at the rate of exchange therefor. Payment at the rate of exchange during the period in question resulted in a loss to the creditor of approximately 40% upon the dollar amount of the claims paid.

4. Claims subject to the "Standstill Agreement" were held by many of the large New York banks, and during the year 1934 various methods were employed to liquidate those claims and to minimize the loss resulting from payment in

registered marks. Plaintiff had, prior to the period involved herein, purchased German common shares with registered marks received in payment of such claims. It was plaintiff's policy to seek means of recouping the exchange loss suffered in the liquidation of such claims, and claims were called for payment when and as such opportunities appeared.

5. In September 1934, plaintiff concluded that the purchase of silver bullion afforded an opportunity to minimize or recoup the loss on German standstill claims, and thereupon determined to liquidate sufficient of those claims to produce proceeds in pounds sterling equivalent to approximately one million dollars and to convert them into an investment in silver bullion.

6. At a meeting of the Board of Directors of plaintiff held on September 4, 1934, a resolution was adopted authorizing the officers of plaintiff to accept registered marks in payment of a portion of the German obligations owned by plaintiff, to sell or otherwise dispose of such registered marks for sterling in an amount not in excess of the approximate equivalent of one million dollars at the then current rate of exchange, and to use such sterling proceeds in the purchase of silver bullion in the London market, and to hold and dispose of the silver so purchased on terms and at prices approved by the officers of plaintiff, all in compliance with the laws, executive orders and other legal requirements of the United States of America.

7. In pursuance of such authority German claims were called and the registered marks received in payment were converted into pounds sterling, and the sterling was used for the purchase in London on behalf of plaintiff of silver bullion as follows:

Date of purchase	Ounces	Cost
Sept. 6, 1934	401, 384. 40	$197, 613. 02
" 13, "	100, 258. 50	49, 067. 39
" 14, "	351, 053. 60	172, 202. 95
" 15, "	99, 810. 10	49, 004. 86
" 19, "	351, 451. 80	173, 029. 79
" 20, "	150, 481. 20	74, 288. 98
Oct. 5, "	301, 100. 50	147, 361. 23
" " "	299, 964. 70	146, 842. 09
Total	2, 055, 504. 80	1, 009, 410. 31

8. Under the conditions existing during September and October 1934, and the usual and customary trade and business practice, the purchases made as above stated constituted a reasonable and orderly method of acquiring and accumulating such a quantity of silver bullion in London without unduly disturbing the market.

9. The silver bullion was stored for the account of plaintiff in London and so held by plaintiff until its sale as hereinafter stated.

10. From the time of the enactment of the Silver Purchase Act of 1934 the United States Treasury became the most important buyer of silver in the world markets. The orders placed in the London market for the account of the Treasury exercised a great influence upon the price of silver. The price of silver rose from a level of approximately fifty cents a fine ounce prevailing at the date of enactment of the Silver Purchase Act in June 1934, to about eighty cents in the Spring of 1935, and thereafter declined to a level of about sixty-four and one-half cents in the early part of December 1935.

11. On or about December 3, 1935, the Silver Committee of plaintiff decided to sell all of the silver bullion owned by plaintiff. Its conclusion was based upon uncertainty as to the buying policy of the United States Treasury as reflected in the declining price trend of silver, the apparent failure of the Government buying to establish and maintain a higher price level, and the unsettled conditions in the Far East indicating that large quantities of silver might be offered for sale from China with a further depressing effect upon the price level.

12. On or about December 3, 1935, the Silver Committee of plaintiff instructed its vice president in charge of the matter to sell all of the silver bullion owned by plaintiff and to carry out the selling during the two weeks' period following that date.

13. The London silver bullion market is operated and controlled by four bullion brokers and all purchases and sales of silver bullion must be made through one of those brokers. Orders to buy or sell may be given for execution

at the "fixing price" or at a named figure. The "fixing price" is established by those brokers by mutual agreement each day before the opening of the market. Ordinarily all orders placed before the opening for purchase or sale at the "fixing price" will be executed. Orders given before the opening to buy or sell at a named figure will be executed only if the "fixing price" is at or above the figure in the case of sales, or at or below the figure in the case of purchases. Orders to buy or sell given after the opening of the market in London, if "at the market" will be executed only in the discretion of the broker and if his or another broker's "book" warrants, while such orders given at a named figure will be executed only if the broker finds a counter order on his or another broker's "book" at the price named. All orders given before the opening influence the judgment of the brokers in establishing the "fixing price" and the weight of buying or selling orders, as the case may be, determines the price trend.

14. In view of the nature of the London market plaintiff's vice president in charge of the matter concluded, in the exercise of his best judgment, that it would be imprudent to offer the entire 2,000,000 ounces of silver bullion for sale in one lot, either "at the market" or "at the fixing" or at a price. On December 2, 1935, he cabled plaintiff's London correspondent to sell 200,000 ounces of silver at the December 3rd fixing price, and to deliver 89 bars stored November 13, 1934, and 91 bars stored November 15, 1934, at Sharps & Wilkins'. On December 3rd he cabled to sell 150,000 ounces at the December 4th fixing price, and to deliver 136 bars stored November 20, 1934, at S. Montagu & Company's. On December 5th he cabled to sell 300,000 ounces at the December 6th fixing price, and to deliver 273 bars stored November 5, 1934, at Prixley & Abell's. On December 7th he cabled to sell 300,000 ounces at the December 9th fixing price, and to deliver 265 bars stored November 5, 1934, at S. Montagu & Company's. On December 9th he cabled to sell 250,000 ounces at the December 10th fixing price, and, if possible, all the remaining silver. The correspondent replied on December 10th that it was unable to execute the order, and that

there had been no operations and no price fixed. Plaintiff on December 10th requested information to be furnished on December 11th as to the fixing price, and comments on the market, and was advised by its correspondent that the transactions were small, representing about one-tenth of the amount offered, and that failing official purchases, the market was obviously weak. Plaintiff made further requests of its correspondent to sell amounts ranging from 250,000 to 500,000 ounces, by cables on December 11, 12, 13, 14, 16, and 17. Against these orders four sales were made by the correspondent, ranging in amounts from 17,554 ounces to 63,412.80 ounces as shown in finding 16. The balance of the silver was sold on January 3 and 6, 1936. Offerings were made in this manner for the purpose of disposing of the silver as rapidly as possible at prevailing prices without creating an undue disturbance in the market through a large single offering, and the vice president of plaintiff in charge of the matter considered that this method of selling was the prudent manner of marketing that silver.

15. Between December 3, 1935, and December 9, 1935, plaintiff sold a total of 951,615 ounces of silver bullion in units as indicated below. On December 9, 1935, silver declined one cent from the fixing price of Saturday, December 7, 1935, and on December 10, 1935, the fixing was delayed for two hours beyond the usual time. Conditions in the London bullion market from that date to and including January 2, 1936, were extremely disturbed and the price of silver bullion declined rapidly. The offerings of silver bullion during that period so far exceeded the demand that there was no reasonable opportunity to dispose of any substantial quantity in an orderly manner until January 3, 1936, when trading in spot silver bullion again resumed activity. On January 3, 1936, and January 6, 1936 (the next trading day) plaintiff sold all of its remaining silver bullion. The sales made from December 3, 1935, to and including December 17, 1935, were made at prices above average cost, while the sales made on January 3 and 6, 1936, were made at prices below average cost.

16. The sales of silver bullion and the proceeds in dollars therefrom were as follows:

Date of sale	Ounces	Receipts from sales
Dec. 3, 1935	100,258.50	$64,847.05
" " "	99,810.10	64,573.39
" 4, "	150,481.20	97,221.58
" 6, "	301,100.50	194,236.64
" 9, "	299,964.70	191,274.59
" 13, "	44,902.30	26,664.21
" 14, "	63,412.80	37,062.13
" 16, "	17,554.00	10,087.23
" 17, "	25,302.90	13,914.46
Jan. 3, 1936	244,783.90	116,362.42
" " "	257,101.90	122,216.24
" 6, "	144,282.30	65,413.18
" " "	306,549.70	138,980.15
Total	2,055,504.80	1,142,853.27

17. A quantity of 2,000,000 ounces of silver bullion constitutes a very substantial amount even under ordinary conditions in the London bullion market, and an offering of such an amount in December 1935 might have caused a violent decline of price. The sales made by plaintiff as above set forth constituted a reasonable and proper method of disposing of such a quantity of silver bullion in the London market in the light of conditions that existed in December 1935, and the nature of trading in that market. A prudent seller of such a quantity of silver at that time in that market would not have offered the entire 2,000,000 ounces for sale at one time. It could not have been determined in advance to what extent an order to sell 2,000,000 ounces in one lot would have depressed the market, and while it might have been possible to sell such a quantity on any one day, there was no way of determining in advance that such a quantity of silver would be taken.

18. The London bullion market was the only available outlet for that silver at that time.

19. Plaintiff regarded the silver in question as a single investment, and both in its purchase and sale considered that it was engaged in a single transaction and was acquiring and disposing of that silver as a single and entire investment. In selling the silver in installments plaintiff did not consider that it was separately transferring different interests in silver bullion.

20. The following expenses were actually incurred by plaintiff in connection with the holding, processing, or transporting of its interest in silver bullion:

Tax stamps	$382.56
Cables	185.35
Commissions	336.83
Insurance	830.17
Storage	4,552.70
Total	6,287.61

21. In addition to the foregoing expenses plaintiff paid legal fees amounting to $2,095.10 to counsel who were retained specifically and only for the purpose of advising in connection with the proposed purchase of silver bullion and the legal problems involved therein. That advice related to questions of tax liability in the acquisition and sale of the silver, including the liability of plaintiff as transferee in the purchase thereof, and its liability as transferor in the sale thereof. The advice also covered questions arising in connection with the place of storage and the place of disposition of the silver, in the light of the provisions of the Silver Purchase Act of 1934. The services also included the preparation and filing of silver-tax returns and the obtaining of rulings and filing of protests in connection therewith. The fee was reasonable in amount.

22. The total receipts from the sale and disposal of silver bullion heretofore referred to were $1,142,853.27; the cost thereof to plaintiff, exclusive of the expenses enumerated above, was $1,009,410.31; the gross profit therefrom was $133,442.96; and the net profit therefrom, after deduction of the expenses enumerated above, inclusive of the legal fee, was $125,060.25.

23. Plaintiff requested a ruling by the Commissioner of Internal Revenue with respect to the taxable status of the aforementioned sales of silver bullion under the provisions of Subdivision 10 of Schedule A of Title VIII of the Revenue Act of 1926 as amended, as added by Section 8 of the Silver Purchase Act of 1934, and Chapter VI of Treasury Regulations 85 relating thereto, and the Commissioner ruled that each of those sales which resulted in an excess of receipts

therefrom over average cost thereof (including allowable expenses) was subject to tax.

24. Thereupon, under protest, plaintiff on January 29, 1936, duly filed with the collector of internal revenue, second district of New York (the district in which the principal place of business of the plaintiff was then located), returns or memoranda for each of the sales of silver bullion, in accordance with the ruling of the Commissioner above referred to, on official Form 2 (Silver).

25. Upon those returns taxes aggregating $74,969.66 were paid to the collector of internal revenue for the second district of New York by the plaintiff on January 30, 1936, by the due affixation to those returns of silver-tax stamps equal to the amount of those taxes, involuntarily and under protest.

26. That amount of $74,969.66 was thereafter turned over to and deposited by the collector of internal revenue, to whom that payment was made by plaintiff, in the Treasury of the United States in the course of his official business.

27. January 31, 1936, plaintiff duly filed with the collector of internal revenue for the second district of New York a claim for refund of $12,439.53, being the amount by which the above specified tax of $74,969.66 exceeded the amount which plaintiff claimed was legally due, and on February 6, 1936, that claim for refund was rejected by the Commissioner of Internal Revenue.

28. On or about March 21, 1936, the collector of internal revenue for the second district of New York reviewed the aforementioned returns of plaintiff and disallowed items of legal expenses referred to above aggregating $2,095.10 and suggested that plaintiff file amended returns.

29. On April 1, 1936, plaintiff duly filed nine amended returns or memoranda covering the transactions in silver bullion on which legal expenses had been so disallowed, eliminating in each of those returns the aforementioned legal expenses.

30. Upon those amended returns additional taxes aggregating $1,047.55 were paid by plaintiff to the collector of internal revenue for the second district of New York on April 1, 1936, by the due affixation to those returns of silver-tax stamps equal to the amount of the additional taxes, involuntarily and under protest.

31. The amount of $1,047.55 was thereafter turned over to and deposited by the collector of internal revenue, to whom the payment was made by plaintiff, in the Treasury of the United States, in the course of his official business.

32. May 26, 1936, plaintiff duly filed with the collector of internal revenue for the second district of New York a claim for refund of the additional taxes of $1,047.55, setting forth in detail the reasons why that amount should be refunded, and on June 11, 1936, plaintiff's claim for refund was rejected in full by the Commissioner of Internal Revenue.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This suit is begun to recover a refund of an alleged overpayment of the tax imposed by section 8 of the Silver Purchase Act of 1934, 48 Stat. 1179. There is no dispute as to the facts in the case which so far as material to the decision to be rendered, are as follows:

In 1934, plaintiff purchased approximately 2,000,000 ounces of silver bullion in eight purchases. Between December 3, 1935, and January 6, 1936, plaintiff sold this silver in thirteen lots by separate sales. The first nine sales in December 1935, were made at a profit, while the last four sales in January 1936 were at prices below cost.

Plaintiff's cost for all of this silver was $1,009,410.31. It incurred expenses of $6,287.61 in connection with holding, processing, or transporting the silver. It paid out legal fees for advice in connection with the proposed purchase of the silver bullion and the legal profits involved therein, together with the liability of plaintiff as transferee in the purchase thereof and its liability as transferor in the sales made. This advice also covered questions arising in connection with the place of storage and disposition of the silver, the preparation and filing of silver tax returns and the obtaining of rulings and filing of protests in connection therewith. The total of these legal fees amounted to $2,095.10 which was reasonable in amount. Gross receipts from the sales were $1,142,853.27, making a gross profit of $133,442.96 and a net profit (if the legal fees are considered a deductible expense) of $125,060.25.

Following the sales plaintiff, under protest, filed returns or memoranda for each. On these returns the expenses, including the legal fees, were deducted from the gross receipts and the total of the tax thus computed amounting to $74,969.66 was paid.

Subsequently the returns were examined and the amount of legal fees was disallowed. Thereupon nine amended returns were filed eliminating the legal fees and additional taxes of $1,047.55 were paid.

Plaintiff filed proper and timely claims for refund claiming that the tax should be but 50 percent of the profit derived from all the sales taken together and that the legal fees should be allowed as deductible expenses. These claims were rejected and this suit was timely brought.

The main issue in the case is whether the tax was properly imposed on the profits of each sale, calculated upon the excess of receipts from such sale over the average cost of all the silver bullion, plus allowed expenses. This method eliminates the loss sustained on that portion of the silver which was sold on January 3 and 6, 1936.

The second issue in the case is whether the Commissioner correctly disallowed the item of $2,095.10 of legal expense as a deductible item.

The plaintiff contends that the sales of silver bullion from December 3, 1935, through January 6, 1936, constituted the transfer of a single interest in silver bullion and that the tax should have been calculated on the difference between the aggregate receipts and the cost thereof, plus allowable expenses.

With this contention we are unable to agree. The statute places a tax on any interest in silver bullion "transferred" if the price exceeds the total of the cost thereof and allowed expenses, and the term "transfer" is defined as follows:

> The term "transfer" means a sale, agreement of sale, agreement to sell, memorandum of sale or delivery of, or transfer, whether made by assignment in blank or by any delivery, or by any paper or agreement or memorandum or any other evidence of transfer or sale; or means to make a transfer as so defined.

Opinion of the Court

Giving to this language its ordinary significance, each separate sale of the silver constituted a separate transfer. Each of these sales was a separate transaction governed and controlled by its terms without regard to other sales that might be made or the total amount of silver bullion held by the plaintiff at the time the sale was made. It is true the statute defines an "interest in silver bullion" as "any title or claim to, or interest in, any silver bullion or contract therefor," but this definition is in general terms referring merely to the nature or the title of the claim or interest in silver bullion transferred and does not define what constitutes a transfer. The fact that plaintiff regarded the 2,000,000 ounces of silver bullion as a single investment and that it considered its method of disposing of such a quantity of silver reasonable and proper in view of the conditions which then existed is entirely immaterial. We conclude that the Commissioner imposed the tax in accordance with the statute.

The plaintiff contends that the application of the silver tax in the manner used in this case involves an unconstitutional interpretation of the statute. Part of its argument in support of this contention is based upon the premise that plaintiff's sales of silver constituted one transaction. In what has been said above we have shown, as we think, that the sales were in fact separate and distinct transactions. But, as we understand plaintiff's argument, it is further contended that even so the tax would be unconstitutional by reason of its being assessed on transactions in silver bullion that showed a profit without making any allowance or deduction for similar transactions that resulted in a loss, and that a tax so assessed cannot be a true income tax. The validity of the tax involved was attacked in the case of *United States* v. *Hudson*, 299 U. S. 498, and while in that case it was argued that the tax was unconstitutional by reason of its retroactive features, the court definitely held that the levy was a "special income tax" and constitutional.

The decision in the *Hudson case*, *supra*, settles the question of whether the tax in controversy is an income tax and we think the opinion in that case holds in effect that Congress

may segregate the income or profit from a particular transaction and tax it separately, without making any provision with reference to losses sustained in other transactions, although they might be similar in their nature. See *Cohn* v. *United States*, 87 C. Cls. 422. The matter of deductions, credits, and allowances on an income tax is in the discretion of Congress, and if Congress sees fit to deny them in unrelated though similar transactions it is acting within its power. This principle has been applied in the limitation placed upon deductions for capital losses in the statutory provisions with reference to the taxes on capital gains which has always been enforced and considered constitutional.

Much of plaintiff's argument is devoted to the question of whether the tax involved is direct or indirect. In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, it was held in effect that the constitutional amendment which authorized the levy of an income tax made it immaterial whether it was a direct tax or an indirect tax. The plaintiff contends that the silver tax is not an excise or an indirect tax and is not sustainable as a direct tax, yet it must be one or the other; and being, as the Supreme Court has held, an income tax, can be sustained on either basis. The *Brushaber case, supra*, is also authority for the principle that a tax levied upon property because of its ownership is direct, while one levied upon property because of its use is an excise duty or impost. The silver tax is manifestly not a tax levied on property because of its ownership but one levied upon the use made of the property. We think, therefore, it is an excise tax, and find no constitutional objection against the manner in which it is applied in the case before us.

It should also be noted, in this connection, that the gains which plaintiff realized were in one calendar year, and the losses in another. The statute makes no reference to calendar or fiscal years, and it would be entirely impracticable to create a taxable year for its enforcement.

The plaintiff paid legal fees amounting to $2,095.10 to counsel who were retained specifically and only for the purpose of advising in connection with the proposed purchase of silver bullion and the legal problems involved therein, including the tax liability when the bullion was sold and the

making of tax returns. This item of expense was disallowed by the Commissioner. The statute specifies definitely certain items of expense which may be allowed. Legal fees are not specified as allowable, and "charges in the nature of overhead" are specifically excluded. The failure to include legal fees in the list of allowable items would, by itself, exclude them, unless there was something further in the statute which would show a different intention. The only further statement in the statute is to the effect that the specified items would include "storage, insurance, and transportation charges," but would not include "interest, taxes, or charges in the nature of overhead." We do not think it is necessary to determine whether the legal fees involved were "in the nature of overhead" as there is nothing in the statute which authorizes their allowance.

It follows that plaintiff's petition must be dismissed, and it is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

THE SHIP CONSTRUCTION & TRADING CO., INC., A CORPORATION, v. THE UNITED STATES

[No. H-376. Decided April 1, 1940. Plaintiff's motion for new trial overruled October 7, 1940]

On the Proofs

Government contract; action of unauthorized individual not binding upon Government.—Where a representative of the Government, or of a Government agency, mistakenly and without authority incorrectly advises a bidder that its bid has been accepted by the Government, or by such governmental agency, it is held that the Government is not bound thereby; and such action gives the bidder, or other party, no rights in the premises other than such rights as may be based upon the action actually taken by such agency within the legal authority of such agency to bind the Government.

Same; estoppel against Government.—Estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employe who is without authority to bind the Government.

Same; acceptance of terms and conditions.—Where a written offer on specific terms and conditions is made and where such terms and conditions therein proposed are accepted without further conditions, and upon the basis of such action nothing further remains to be done except the signing of a formal contract embodying such terms and conditions, there exists a valid contract in the absence of a statute or regulation imposing further requirements.

Same; written agreement.—Where parties dealing with each other with the purpose of arriving at a contract intend that their negotiations shall be finally reduced to writing and signed by them as evidence of their agreement upon terms and conditions, there exists no binding contract until the written instrument setting forth such terms and conditions is executed.

Same; approval of contract by another.—Where one authorized to do so receives a bid and awards a contract but such action is subject to the approval of another, and that approval is not subsequently given, no binding contract exists on which the United States may be required to respond in damages as for a breach.

Same; contract by agency of Government.—Where a contract was made by the United States Shipping Board Fleet Corporation in its corporate capacity, it is held that in such action the Fleet Corporation, an operating agency of the United States Shipping Board, was acting on behalf of and as an instrumentality of the United States through the Shipping Board.

Same; agency of Government undisclosed.—The fact that a contract entered into by the Fleet Corporation did not state that the Fleet Corporation was representing, or acting as the agent of, the United States does not preclude the assertion of agency in a suit arising out of said contract.

Same; statute of limitation.—Where under the provisions of the Merchant Marine Act of June 5, 1920, a claim by the Fleet Corporation against the plaintiff, arising out of an overpayment, was transferred to the Shipping Board, a governmental agency, and where the cause of action on the overpayment did not accrue until July 28, 1919, said claim was not barred by the statute of limitation on June 5, 1920, when such transfer of said claim was effected.

Same.—The right of the United States to sue upon such claim is not barred by the statute of limitation.

The Reporter's statement of the case:

Mr. A. Hayne de Yampert for the plaintiff. *Mr. J. Bruce Kremer* and *Mr. Herbert M. Bingham* were on the brief.

Mr. Frank J. Keating, with whom was the Assistant Attorney General, for the defendant. *Mr. William W. Scott* was on the brief.

Plaintiff sues to recover $3,198,298 for alleged breach of an alleged contract under which it claims that it purchased a fleet of 268 wooden ships, together with machinery, equipment, spare parts and supplies therefor, all of which it is alleged the defendant unlawfully refused to deliver. No formal contract was ever entered into or executed by the parties, and plaintiff bases its suit upon its original and amended bids which it claims the United States, acting through the United States Shipping Board, unconditionally accepted on August 9, 1921. The amount which plaintiff seeks to recover represents the alleged difference between the amount of its bid and the alleged market value of the ships and equipment.

The defendant denies that it, through the Shipping Board, ever accepted the terms and conditions of plaintiff's bid and insists that no contract as to the terms and conditions of any sale of the ships to plaintiff was ever made between the parties. The defendant further insists that the record does not establish that the fair market value of the fleet of ships involved as a whole at the date of the alleged breach of the alleged contract was in excess of the amount of plaintiff's bid, and therefore that plaintiff has proved no damage and is not entitled to recover. In addition, the defendant sues plaintiff on a counterclaim for an overpayment made to plaintiff between November 22, 1917, and July 28, 1919, under two contracts of June 15 and November 22, 1917, respectively. The parties have stipulated that if the defendant is entitled to maintain the counterclaim and to recover thereon, the amount of the overpayment which is due and owing to the defendant from plaintiff is $299,918.27.

Plaintiff insists that the United States does not own the claim asserted in its countersuit because the contracts under which the overpayment was made by the United States Shipping Board Emergency Fleet Corporation were entered into by the Fleet Corporation and the transactions thereunder were carried out by the Fleet Corporation in its corporate capacity and not on behalf of, or as the representative of, the United States, or in the exercise of any governmental power or authority, and that, in any event, the defendant cannot recover for the reason that the cause of

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action for the overpayment was barred by the statute of limitation of six years prior to the time the counterclaim was filed.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. In the summer of 1921 the United States Shipping Board publicly advertised for sale 285 wooden ships stated as built in the national war emergency to convey food and munitions for American soldiers overseas, but unsuited for the homogeneous fleet contemplated by the Merchant Marine Act, 1920.

The advertisement further stated that sealed bids were invited from brokers, salvage companies, and operators of vessels of all nations in the world to be opened on July 30, 1921, at 10:30 a. m., in the offices of the board in Washington, D. C. The wooden vessels were described as of eleven types, ranging in size from 2,500 to 4,900 dead-weight tons, available as follows:

Number available

9 DOUGHERTY TYPE: Designated d. w. t. 4,920; Length, 300 ft.; Breadth, 48 ft.; Depth, 28 ft. 6 in.; Bunkers-Coal, 578.5; Daily Fuel Consumption, 28; Speed, 10; Steaming Radius, 7,218; Engines, 1 Trip. Exp. aft, I. H. P. 1,400; Boilers, 2 Bab. and Wilcox Water Tube; Cargo, Bale, 193,200; Grain 193,200.

15 BALLIN TYPE: Designated d. w. t. 4,165; Length, 285 ft.; Breadth, 43 ft.; Depth, 20 ft.; Bunkers-Coal, 572; Daily Fuel Consumption, 30; Speed, 8; Steaming Radius, 3,660; Engines, Trip, Exp., I. H. P., 1,500; Boilers, 2 Stand. Water Tube; Cargo, Bale, 149,750; Grain, 149,750.

10 PENINSULA TYPE: Designated d. w. t., 4,000; Length, 269 ft.; Breadth, 48 ft. 8 in.; Depth, 27 ft. 6 in.; Bunkers-Coal, 607; Daily Fuel Consumption, 24; Speed, 10; Steaming Radius, 6,069; Engines, Turbine, West.; Boilers, 2 Stand. Water Tube; Cargo, Bale, 149,041; Grain, 149,041.

Reporter's Statement of the Case

Number available

7 PAC. AM. FISHERIES: Designated d. w. t. 3,500; Length, 268 ft. 4 in.; Breadth, 46 ft.; Depth, 26 ft.; Bunkers-Coal, 483; Daily Fuel Consumption, 30; Speed, 8; Steaming Radius, 4,051; Engines, 2 Trip. Exp., I. H. P. 1,500; Boilers, 2 Stand. Water Tube; Cargo, Bale, 121,585; Grain, 121,585.

1 LAKE AND OCEAN NAVIGATION CO. TYPE: Designated d. w. t. 2,500; Length, 245 ft.; Breadth, 42 ft.; Depth, 26 ft.; Daily Fuel Consumption, 20; Speed, 10; Engines, 1 Trip. Exp., aft, I. H. P. 1,400; Boilers, 2 Stand. Water Tubes.

8 STANDIFOR TYPE: Designated d. w. t., 3,416; Length, 268 ft.; Breadth, 46 ft.; Depth, 26 ft.; Bunkers-Coal, 492; Daily Fuel Consumption, 30; Speed, 8; Steaming Radius, 3,148; Engines, 2 Trip. Exp., I. H. P., 1,400; Boilers, 2 Ballin Water Tube; Cargo, Bale, 111,904 Cubic Feet; Grain Cargo, Cubic, 126,104.

1 ALLEN TYPE: Designated d. w. t., 3,755; Length, 274 ft. 6 in.; Breadth, 44 ft. 9 in.; Depth, 26 ft. 4 in.; Bunkers-Coal, 487.2; Daily Fuel Consumption, 30; Speed, 8; Steaming Radius, 4,035; Engines, 1 Trip. Exp., I. H. P., 1,400; Boilers, 2 Stand. Water Tube; Cargo, Bale, 138,111; Grain, 157,686.

15 MCCLELLAND TYPE: Designated d. w. t., 3,575; Length, 270 ft.; Breadth, 45 ft.; Depth, 24 ft. 3 in.; Bunkers-Coal, 290; Daily Fuel Consumption, 26; Speed, 9.3; Steaming Radius, 2,584; Engines, 1 Trip. Exp., I. H. P. 1,400; Boilers, 2 Baden Water Tube; Cargo, Bale, 139,111; Grain, 156,081.

180 FERRIS TYPE: Designated d. w. t., 3588; Length, 268 ft.; Breadth, 45 ft. 2 in.; Depth, 26 ft.; Bunkers-Coal, 477; Daily Fuel Consumption 30; Speed, 8; Steaming Radius, 3,954; Engines, 1 Trip. Exp., I. H. P., 1,400; Boilers, 2 Stand. Water Tube; Cargo, Bale, 148,992; Grain, 148,992.

28 HOUGH TYPE: Designated d. w. t., 4,005; Length, 274 ft.; Breadth, 46 ft.; Depth, 28 ft.; Bunkers-Coal, 900; Daily Fuel Consumption, 28; Speed, 8; Steaming Radius, 7,792; Engines, 2 Trip. Exp., I. H. P., 1,400; Boilers, 2 Stand. Water Tube; Cargo, Bale, 147,680; Grain, 147,680.

Number available

11 GRAYS HARBOR TYPE: Designated d. w. t., 3,665; Length, 274 ft. 6 in.; Breadth, 49 ft.; Depth, 28 ft. $1\frac{1}{2}$ in.; Bunkers-Coal, 383; Daily Fuel Consumption, 30; Speed, 8; Steaming Radius, 3,111; Engines, 2 Trip. Exp., I. H. P., 1,400; Boilers, 2 Stand. Water Tube; Cargo, Bale, 177,467; Grain, 177,467.

Of the 285 ships so advertised plaintiff conceded on the trial that only 268 were available for sale to it by the Shipping Board, having a total dead weight of 990,814 tons.

The 268 ships now in controversy, weighing 990,814 dead weight tons, were of the following types:

Type	*Number*	*Tons*
Dougherty	8	37, 600
Ballin	13	54, 289
Peninsula	5	19, 570
Pacific American Fisheries	6	21, 000
Standifer	6	20, 496
McClelland	14	49, 900
Ferris	176	635, 569
Hough	28	109, 575
Grays Harbor	11	40, 315
Lake & Ocean Navigation	1	2, 500
	268	990, 814

and of an average dead weight of about 3,700 tons. They were all the property of the United States.

2. Plaintiff, a corporation of the State of New York, organized in 1917 for the purpose of constructing, repairing, rebuilding, exchanging, trading, and dealing in ships, boats, and vessels of every kind and description, acting as ship brokers, and engaging in a general wrecking business, submitted the following bid to the Shipping Board July 30, 1921, in response to the advertisement:

WASHINGTON, D. C., *July 30, 1921.*

UNITED STATES SHIPPING BOARD,
Washington, D. C.

GENTLEMEN: On behalf of my principals, the Ship Construction & Trading Company, Inc., of 11 Broadway, New York, I hereby bid for the entire Fleet of wooden steamships as advertised, estimated as being 287 in number, together with all equipment, spare parts and supplies belonging to or purchased for the wooden

steamships, whether on board or ashore, now on hand and not heretofore sold, Twenty One Hundred ($2,100.00) Dollars for each steamship, payment fifty (50%) per cent of the whole amount in cash, the remaining fifty (50%) per cent on each steamship as delivery is taken of it, with the following provisions:

1st. That delivery shall be made by you within fourteen (14) days of all the equipment, spare parts and supplies which are now ashore belonging to or purchased for the wooden steamships.

2nd. Delivery shall be made by you of the steamships, together with all equipment, spare parts and supplies as called for by the buyer, who agrees to take delivery of the entire fleet within one year from the date of your acceptance of this bid.

3rd. All the ships, equipment, spare parts and supplies are to be delivered to the buyer free and clear of all incumbrances at time of delivery.

4th. Points of delivery shall be at the places where the steamships, equipment, spare parts, and supplies now are.

5th. You shall deliver to the buyer within fourteen (14) days complete inventory of all the steamships, equipment, spare parts and supplies, together with all information and data you and/or the United States Shipping Board Emergency Fleet Corporation have, covering the ships and materials purchased, including plans and blue prints.

6th. You will grant the privilege of transfer of flag to foreign register and do all the things necessary within your power to accomplish such transfer, if requested by the buyer.

7th. The buyer agrees that it will junk or cause to be junked not less than fifty (50%) per cent in number of the ships purchased hereunder, and that it will cause not less than twenty-five (25%) per cent of the ships purchased hereunder to be transferred to foreign register.

8th. If this bid is accepted, you will turn over to the buyer any and all bids received by you for individual ships or groups of ships less than the entire fleet, and of such bids, if any, which the buyer elects to accept you will turn over to it, properly endorsed, the checks received with such bids, all provided that your counsel informs you that you may legally do so.

9th. Should the number of steamships purchased hereunder exceed 287 in number, then the buyer will

pay in cash Ten Hundred and Fifty ($1,050.00) Dollars (one-half of the purchase price) per ship in excess of 287 and should the number be less than 287, then you shall return to the buyer Ten Hundred and Fifty ($1,050.00) Dollars per ship less than 287.

Respectfully submitted.

(Signed) M. S. ORTH.

136 LIBERTY STREET, *New York, N. Y.*

On August 2, 1921, the plaintiff handed over to the Shipping Board, to apply on its bid, a certified check signed by one W. L. Alderson, payable to the order of the Shipping Board, for $60,270, which, on its face, recited: "Deposited with M. S. Orth's bid of July 30, 1921, for Ship Construction & Trading Co. for wooden steamships and to be returned by Aug. 10, 1921, if said bid is not accepted." M. S. Orth was plaintiff's vice president.

The total sum bid amounted to $602,700, being 287 ships at $2,100, and the amount deposited was 10 percent of the offer.

3. This was the highest bid received for the wooden fleet as a whole. The board did not consider or act upon this bid as to whether it would accept or reject the same for the reason that it was clear to the board that certain of the conditions stipulated in plaintiff's bid were not acceptable. There were negotiations between representatives of plaintiff and the board, as a result whereof plaintiff on August 5, 1921, submitted to the board an amended bid in words and figures as follows:

WASHINGTON, D. C., *August 5, 1921.*

UNITED STATES SHIPPING BOARD,
Washington, D. C.

Attention: Commissioner E. C. Plummer and Mr. Edward P. Farley.

GENTLEMEN: Referring to our bid for your wooden steamships advertised for sale and to our conversations regarding same, we understand from you that ours was the only bid for all the ships and that you would like to accept it, provided some changes in our conditions can be agreed upon and some new conditions made to meet your views of a proper contract for you to enter into, and particularly in view of some developments

that have taken place and some information that you have received since the bids were opened, viz:

(a) You would like to furnish fifty (50) of the ships for a public pontoon bridge, provided the engineers determine that the ships are suitable for the purpose.

(b) You would like to accept for your own account the bids received by you on seven (7) steamships, at a higher price than our per ship bid.

(c) You would like to settle a claim by delivering two (2) of the steamships to a claimant, if settlement can thereby be made.

(d) You have learned that some of the steamships advertised have claims against them in excess of two thousand one hundred ($2,100.00) dollars and you may want to exclude these from those to be sold.

(e) You have learned that more than two hundred (200) of the steamships advertised have been stripped in part of their machinery, equipment, spare parts, and supplies and that some portion of such machinery, etc., has been sold, lost, and/or issued to other ships.

In view of the above and of the fact that our deposit check accompanying bid must by the terms entered upon the face of it, be returned by August 10th if our bid has not then been accepted and that it would seem to be impossible to agree upon and have written in final form before August 10th all the wording of a contract covering the sale, we offer the following changes in the conditions made in our bid and the following additional conditions and agree that they shall be a part of our bid if accepted by you.

(1) You shall exclude from the ships to be sold and delivered to us:

The fifty (50) ships mentioned in (a) above;
The seven (7) ships mentioned in (b) above;
The two (2) ships mentioned in (c) above;
Ships not exceeding twelve (12) mentioned in (d) above;

and you shall have the option until August 22, 1921, of withdrawing any one or more of these steamships from the exception and of including them in the number of steamships sold to us.

(2) We shall accept the steamships and machinery, equipment, spare parts, and supplies at the places where they now are and in the condition that they are at the time of delivery to us, without any warranty by you of the condition or capacity of any steamship; and that

we will lose whatever of the machinery, equipment, etc. taken from these steamships that has been heretofore sold, lost, or issued to other ships by you, unless you can replace same from other similar material owned by you and not issued to other ships; and it shall be your obligation to deliver to us whatever of such machinery, equipment, etc., that we call for, if you have it at the time or times called for, within one year from this date—by which we mean to say that it is the intent of the parties to transfer the steamships where they are, as they are, including full complement of machinery, equipment, spare parts and supplies, provided you have such machinery, equipment, etc., for the purpose.

(3) Beginning ninety (90) days from the date of the contract we shall be obliged to take forty (40) steamships each month, but any taken during the ninety (90) days shall be credited against those first to be taken, and any in excess of forty (40) taken during any month shall be a credit against the forty (40) to be taken the next succeeding month. You to agree to deliver steamships as rapidly as called for by us, and simultaneously with the delivery of each steamship to deliver us a good and sufficient bill of sale of such steamship, conveying to us full title and warranting said steamship to be free and clear of all liens at the time of delivery thereof.

(4) You to permit us to transfer any or all of the steamships to foreign registry and flag if requested by us.

(5) We to agree that we will junk, or cause to be junked, one hundred and forty-three (143) of the steamships, but included in these one hundred and forty-three (143) shall be considered all of the steamships withdrawn by you under first hereof—in other words we have the right to keep in operation as steamships one-half (½) of the number advertised by you.

(6) The eighth provision of our bid of July 30th is withdrawn.

(7) We shall pay you reasonable storage charges for all materials tendered us of which we fail to take delivery while same are in your custody.

(8) Payment for the ships sold and delivered to us shall be in gold coin, or its equivalent, as follows:

> Ten (10%) percent of the purchase price of each steamship sold to us hereunder upon the execution of this agreement. The sixty thousand two hundred and seventy ($60,270.00) dollars deposited with you

by us prior to the execution of this agreement to be applied to the extent necessary to this payment and the balance, if any, to be repaid immediately to us.

Forty (40%) percent of the purchase price of each steamship sold to us hereunder ninety (90) days from the date of this agreement.

Fifty (50%) percent of the purchase price of each steamship upon the delivery thereof, except that, in the event that more than fifty (50%) percent of the purchase price of any steamship has been paid prior to the time of the delivery, then this payment shall be the balance of the purchase price of said steamship.

In case we should default, with respect to any of the payments, you shall have the right to declare such payment and all future payments due and payable, and such amounts thereby becoming due and payable shall bear interest at the rate of five and one-half (5½%) percent per annum from that date until paid.

(9) Within twenty (20) days from the date of the execution of the contract we shall furnish you satisfactory evidence of our financial responsibility, or at our option a bank guaranty or surety bond of a responsible bank or surety company guaranteeing the faithful performance of this agreement by us.

In case you accept our bid, with the above changed and new conditions, it shall be agreed that a formal contract shall be drawn and agreed upon by your legal department and our attorneys promptly, and executed by both of us and that, in the meantime, we shall both be firmly bound.

Faithfully yours,

THE SHIP CONSTRUCTION & TRADING CO., INC.,
By F. J. S., *President.*

The fifty ships referred to in the amended bid in connection with a public pontoon bridge were not furnished by the Shipping Board for that purpose and are included in the ships now in controversy.

The seven ships referred to as bid on at a higher price than plaintiff's are not included in the 268 ships now in controversy.

The two ships referred to as possible of use in settlement of a claim were applied to that purpose and are not included in the 268 ships now in controversy.

Of the ships referred to in the amended bid as having claims against them in excess of $2,100, eight were surrendered to

satisfy liens in excess of $2,100 and are not included in the 268 ships in controversy.

Of the ships referred to in the amended bid as having claims against them in excess of $2,100, there are included in the 268 ships in controversy four that were not so surrendered, viz., the *Campello* (McClelland type, 3,500 d. w. t.); *Alderman* (Dougherty type, 4,700 d. w. t.); *Calala* (Ballin type, 4,165 d. w. t.); and *Nawitka* (Dougherty type, 4,700 d. w. t.); total 17,065 dead-weight tons.

Included in the 268 ships in controversy was the *Fairfield*, of the Ferris type, weighing 3,588 dead-weight tons. This ship was wrecked and the wreckage sold July 23, 1921, at a price not shown.

Of the 268 ships in controversy, one, the *Sturgeon Bay*, which appears to have been of the Lake & Ocean Navigation Co. type and which was of 2,500 dead-weight tons, was specifically excepted by the Shipping Board by resolution of August 9, 1921, from immediate sale, and was thereafter, October 19, 1921, transferred to the United States Navy. It was eventually sold by the Navy Department in March of 1928 for $10.650.

Of the 268 ships in controversy there were also on August 9, 1921, by a resolution specifically excepted by the Shipping Board from immediate sale the *Balliett* and *Coconino* ships of the Hough type, each weighing 4,005 dead-weight tons, a bidder having offered $7,500 each on certain terms of payment, the Shipping Board desiring to negotiate for cash.

Of the 268 ships in controversy the following ten were sold in Europe on August 19, 1921, by the Shipping Board to Hulton, Thompson & Co. for $5,000 each: *Airlie* (Ballin type, 4,000 d. w. t.); *Argenta* (Dougherty type, 4,700 d. w. t.); *Birchleaf* (Ballin type, 4,000 d. w. t.); *Byfield* (Ballin type, 4,326 d. w. t.); *Cowardin* (Dougherty type, 4,700 d. w. t.); *Itompa* (Dougherty type, 4,700 d. w. t.); *Neabsco* (Dougherty type, 4,700 d. w. t.); *Thala* (Ballin type, 4,000 d. w. t.); *Wallawa* (Ballin type, 4,165 d. w. t.); and *Zavalla* (Dougherty type, 4,700 d. w. t.). The total dead-weight tonnage thus sold was 43,991, at an aggregate price of $50,000.

Also included in the 268 ships in controversy is the *Fort Seward*, of the Ferris type, 3,688 d. w. t., which was sold by the Shipping Board February 10, 1922, to R. Starita, for $8,000.

Subtracting from the list of 268 ships in controversy the four ships that had claims against them in excess of $2,100 which were not surrendered to satisfy liens (the *Fairfield*, the *Sturgeon Bay*, the *Balliett*, and the *Coconino*) and the ten ships which were sold in Europe, there were left 250 ships available for sale to the plaintiff.

4. For August 9, 1921, the following appears in the official minutes of the United States Shipping Board:

> 845.32—850 St 2. Sale of wooden steamers.
>
> Comr. Plummer presented a report, recommendations, and a proposed resolution as to the action to be taken by the Board on bids received and opened July 30, 1921, for the purchase of the fleet of wooden vessels owned by the Board. After considerable discussion the resolution presented by Comr. Plummer was adopted on motion duly made, seconded, and carried, subject to its revision in certain particulars by Comrs. Plummer and Thompson and Assistant to the Chairman Farley. The revised resolution, as finally presented to the Secretary, was as follows:
>
> "WHEREAS, The United States Shipping Board, in order to accomplish the declared purposes of the Merchant Marine Act, 1920, and to carry out the policy declared in Section 1 thereof, has done all the things required of it to be done under Sections 5 and 6 of said Act, with respect to the sale of its fleet of wooden steamships, and
>
> "WHEREAS, The Board, as a part of said requirements, advertised throughout the country the wooden steamships for sale, and invited the citizens of all of the countries of the world to submit sealed bids on them, to be opened July 30, 1921, all in an effort to sell said fleet at the highest price obtainable, and
>
> "WHEREAS, The bid of the Ship Construction & Trading Co., Inc., of New York, N. Y., was the highest bid received for the entire fleet of wooden steamships at the time of the public opening of the bids, and
>
> "WHEREAS, The Ship Construction & Trading Co., Inc., did on August 5, 1921, in writing, revise its bid, making some changes favorable to the Board: Now, therefore, be it

"RESOLVED, That the bid of the Ship Construction & Trading Co., Inc., dated July 30, 1921, as revised August 5, 1921, whereby the Company agrees to pay $2,100.00 for each of the wooden vessels not covered by higher bids, and not reserved, be, and hereby is, accepted."

After further discussion, on motion duly made, seconded, and carried, the following resolution was adopted:

"WHEREAS, The United States Shipping Board, in order to accomplish the declared purposes of the Merchant Marine Act, 1920, and to carry out the policy declared in Section 1 thereof, has done all the things required of it to be done under Sections 5 and 6 of said Act, with respect to the sale of its fleet of wooden steamships, and

"WHEREAS, The Board, as a part of said requirements, advertised throughout the country the wooden steamships for sale, and invited the citizens of all of the countries of the world to submit sealed bids on them, to be opened July 30, 1921, all in an effort to sell said fleet at the highest price obtainable; therefore be it

"RESOLVED, That the following bids received as the result of said advertisement be and they are hereby accepted:

"Bid of Paulsen Trading Syndicate, 109 Broad Street, New York City, to purchase the S. S. *Cartona* for $5,000.00, on terms set forth in their letter to the United States Shipping Board, dated July 29, 1921.

"Bid of Pendleton Bros. Inc., 130 Pearl Street, New York City, to purchase five (5) wooden steamers to be selected by them from those hauled up at Claremont, Virginia, for $25,000.00 cash, on terms set forth in their letter to the Secretary, United States Shipping Board, dated July 29, 1921.

"Bid of Union Sulphur Company, 17 Battery Place, New York City, to purchase the S. S. *Clio* for $5,000.00, on terms set forth in their letter to the Secretary, United States Shipping Board, dated July 26, 1921.

"*Provided*, That the bid of F. D. Underwood, 50 Church Street, New York City, to purchase the wooden steamships *Balliett* and *Coconino* for $7,500.00 apiece, on terms of payment set forth in his letter to the Manager of Ship Sales, dated July 13, 1921, be and it hereby is rejected as made, and the Manager of Ship Sales, be and he hereby is authorized to negotiate for the sale of said vessels to said bidder for $7,500.00 each cash.

"FURTHER RESOLVED, That fifty of the vessels covered by said advertisement be reserved in connection with the offer of George A. Post on behalf of the Hudson River Bridge and Terminal Association of New York City, for use by said Association in the construction of the proposed pontoon bridge across the Hudson River.

"FURTHER RESOLVED, That all other bids received as the result of said advertisement be and they are hereby rejected, provided that Commissioner Plummer and Assistant to the Chairman Farley be and they are hereby authorized to negotiate with bidders to purchase the S. S. *Sturgeon Bay* with a view to the sale of said vessel for the highest price obtainable therefor, reporting action taken to the Board for formal confirmation."

A true record.

Approved: *Except for the item* on page 3968 re *sale of wooden ships* (845.32—850 St 2) *which is not approved.* [Italics ours.]

(Sgd.) LISSNER,
Commissioner.
(Sgd.) CLIFFORD W. SMITH,
Secretary.

Commissioner Lissner had been designated by the board to verify the correctness of and to approve the minutes of the board's meetings. He refused to approve the minutes as prepared by the secretary of the board of August 9, 1921, relating to the purported acceptance of plaintiffs' bid and sale of the wooden ships (845.32—850 St. 2) to plaintiff because they were not correct and did not represent the action actually taken by the board with reference to plaintiff's bid. The minutes prepared by the secretary which Commissioner Lissner refused to approve have never been adopted, ratified, or approved by the board. The Shipping Board did not on August 9, 1921, or at any time prior or subsequent thereto, adopt or approve the above-quoted incorrect and incomplete resolution purporting to disclose the action taken by the board with reference to plaintiff's bid, nor did the board at any time take any action unconditionally accepting the terms or conditions of plaintiff's bid, or any subsequent modification thereof, for 268 ships, or any less number of ships, in the fleet of wooden ships theretofore advertised for sale. At the meeting of

August 9, which lasted several hours, there was considered and discussed among the six members of the board, one member being absent, the general question of sale of the wooden fleet in connection with bids that had been received, of which plaintiff's was the highest offer, for the whole fleet, and which bid of plaintiff was then before and under consideration by the board. The action actually taken by the board at this meeting of August 9 with reference to plaintiff's bid was only tentative and preliminary to final consideration and action upon the bids as to the terms and conditions upon which the board would enter into a contract of sale of the ships to plaintiff and for the purpose only of authorizing further negotiations with plaintiff and further consideration by or on behalf of the Board of the acceptance or nonacceptance of the many terms of the condition of the bid by a committee composed of the chairman of the board, a commissioner appointed for that purpose by the chairman, and the assistant to the chairman, Edward P. Farley. At that time the board was unwilling definitely to accept plaintiff's bid on the terms made or on any definite terms, no definite terms of sale being then considered by the board; but the board did not desire to reject the bid if a basis for a trade satisfactory to the board and also satisfactory to the President of the United States and to Congress, at the discretion of the President, could be arrived at. For reasons not necessary to be here set forth the board at that time was not willing to take and did not take any definite and final action on the terms stated in plaintiff's bid or on any other definite terms, but these matters were left open for negotiation, and further consideration and action. The board did not at the meeting of August 9, or at any time, specifically consider or act upon the specific terms and conditions proposed by plaintiff in its bid. At this meeting of August 9 the board did not know nor did it decide how many of the 285 ships advertised would be available for delivery. The board had not actually appraised, or had appraised for it, the ships either with or without equipment; it did not know or have an inventory of the amount or value of the equipment, spare parts, and supplies belonging to or purchased for the

ships on board or on shore not then issued to other ships or not sold, and the board did not on August 9 or at any other time make any decision in connection with plaintiff's bid as to ship equipment, spare parts, and supplies or whether any equipment or supplies not on the ships would be sold or delivered with any ships that might be sold. For the foregoing reasons, and others, the board at this meeting on August 9, 1921, voted only a general approval or disposition of the wooden fleet providing a satisfactory contract under the terms and conditions of which the ships could be sold could be agreed upon with plaintiff, whose bid was then before the board, and on the further conditions that (1) they were satisfied with the financial standing of plaintiff and its ability to perform, (2) that the President of the United States would assent to the sale upon such terms and conditions as should be agreed upon, and (3) that the proposed sale would be submitted to Congress for approval at the discretion of the President.

5. The fleet of wooden ships involved in this suit were transferred to the Shipping Board by section 4 of the Merchant Marine Act of June 5, 1920 (Tit. 46, U. S. Code 863, 41 Stat. 988). Section 5 of that act authorized the Shipping Board to sell the ships "after appraisement and due advertisement." The Shipping Board duly advertised the ships but no appraisement within the meaning of the statute was made of the ships by the board, or ordered to be made for it, at any time prior to August 15, 1922.

6. On August 10, 1921, plaintiff's vice-president, upon inquiry by him, was advised by Commissioner Plummer of the board that a resolution accepting plaintiff's bid had been adopted by the board. Commissioner Plummer was not present during much of the discussion concerning the sale of the wooden ships at the meeting of the board on August 9, 1921, and, for that reason, he was not correctly or fully informed as to the exact nature and extent of the action which the board had taken. On the following day, August 10, plaintiff's vice-president requested of Commissioner Plummer a copy of the resolution and the commissioner instructed the secretary of the board to prepare and deliver the same to plaintiff's vice-president. On August 12, 1921,

the secretary of the board prepared, and there was delivered to plaintiff's vice-president, the following document which did not correctly disclose the action taken by the board:

WHEREAS, The United States Shipping Board, in order to accomplish the declared purposes of the Merchant Marine Act, 1920, and to carry out the policy declared in Section 1 thereof, has done all the things required of it to be done under Sections 5 and 6 of said Act, with respect to the sale of its fleet of wooden steamships, and

WHEREAS, The Board, as a part of said requirements, advertised throughout the country the wooden steamships for sale and invited the citizens of all of the countries of the world to submit sealed bids on them, to be opened July 30, 1921, all in an effort to sell said fleet at the highest price obtainable, and

WHEREAS, The bid of The Ship Construction & Trading Co., Inc., of New York, N. Y., was the highest bid received for the entire fleet of wooden steamships, at the time of the public opening of the bids, and

WHEREAS, The Ship Construction & Trading Co., Inc., did on August 5, 1921, in writing, revise its bid, making some changes favorable to the Board,

NOW, THEREFORE, RESOLVED, That the bid of The Ship Construction & Trading Co., Inc., dated July 30, 1921, as revised August 5, 1921, whereby the company agrees to pay $2,100.00 for each of the wooden vessels not covered by higher bids and not reserved, be, and hereby is, accepted.

EDWARD C. PLUMMER,
Commissioner.
EDWARD P. FARLEY.

I hereby this 12th day of August 1921 certify that the foregoing is a true and correct copy of a resolution adopted by the United States Shipping Board at a meeting of August 9, 1921.

(s) Clifford W. Smith,
CLIFFORD W. SMITH,
Secretary.

The names of Edward C. Plummer, commissioner, and Edward P. Farley were written *pro forma* at the end of this document by the board's secretary. Farley did not sign the copy of this resolution and did not know until later that the document had been prepared and delivered to plaintiff.

The board did not authorize the delivery of any resolution to plaintiff and did not know of the advice given to plaintiff by Commissioner Plummer until a few days after the document had been prepared and delivered. Shortly afterward plaintiff was informed on behalf of the board that the board had not unconditionally accepted its bid, but that it had only voted to authorize a sale of the fleet to plaintiff provided the terms and conditions of a sale satisfactory to the board could be agreed upon. Plaintiff insisted, however, on the basis of the document last above-quoted, that its bid as made had been accepted by the board and that the contract to be drawn and executed should strictly embody all the terms and conditions of its bid. Thereafter negotiations were carried on with plaintiff by the committee designated by the board for that purpose with the view of arriving at the terms and conditions of a contract of sale. But plaintiff refused to agree to the terms proposed by the board and the board refused to agree to the terms proposed by plaintiff. At meetings of the board on August 18 and 19, 1921, the board again had before it and considered the matter of plaintiff's bid in connection with the terms and conditions of the contract of sale with reference to which the negotiations were then being carried on with plaintiff, and the committee of the board, who had negotiated with plaintiff through Commissioner Plummer, reported to the board on August 19 in part as follows:

> The bid called for a whole lot of stuff, and Mr. Farley and I sat with them and we said we could not consider such a thing, and that although they were the only bidder we would have to reject the bid unless they would make the Board absolutely safe. We have trimmed off limb after limb of their proposition until it practically got to this. They were to take such vessels as we would sell them. That was cutting out Post and the higher bidders—take them as they were, where they were and with such equipment on them, of which equipment we would be the sole judge. Such equipment as they needed they must get at their own expense, and we took the liberty of saying that as we had a tug down there that we had no particular use for, we would let them use the tug, they paying the expenses, and that they would have to get through in ten months.

On August 11, 16, 17, and 19 the board had drafted and submitted to plaintiff proposed contracts, all of which plaintiff refused to accept on the ground that none of the contracts proposed contained all the terms and conditions of the bid which plaintiff insisted had been accepted as made—of all of which the board was advised at the meetings on August 18 and 19. At these meetings the board proceeded on the basis of the action taken by it on August 9, as hereinbefore set forth in finding 4, and at the meeting of August 19 the board, after having discussed and considered negotiations which had been had with plaintiff to that date and the contentions being advanced by plaintiff, adopted the following resolution:

> RESOLVED, that the form of contract and bond covering the proposed sale of wooden ships to The Ship Construction and Trading Company, Inc., satisfactory to the General Counsel of the Board be presented to The Ship Construction and Trading Company, Inc., August 20, 1921, and that such Company be given until 10 A. M. on Tuesday morning, August 23, 1921, to execute such contract, and FURTHER RESOLVED, that unless the contract be then delivered by such Company to the Board duly executed, all agreements and negotiations with such Company be terminated and canceled and all action of the Board heretofore taken be then deemed rescinded and terminated.

7. A certified copy of this resolution and the original form of contract, and the bond mentioned therein, were delivered to plaintiff by the board on August 20, 1921. Copies of the proposed contract and bond are in evidence as plaintiff's exhibit 11 and defendant's exhibit 17, respectively, and are made a part hereof by reference. Prior to August 23, 1921, plaintiff advised the board that the contract form was not satisfactory to it because, as it alleged, there were a number of ambiguities in it, and it did not conform to the terms of its bid, and requested an opportunity for further negotiations. The terms of the contract prepared by the board and delivered on August 20 to plaintiff for execution differ from plaintiff's bid by the following provisions:

a. Payment of 5% interest on the balance of the purchase price of the ships from the date of the contract.

b. Any balance of the 10% deposit (submitted with plaintiff's bid) to be credited towards the balance of the purchase price due on the ships instead of returning it to the plaintiff.

c. After delivery and acceptance of the bond to be furnished by plaintiff, the plaintiff was to undertake the care of the ships at its own expense.

d. The decision of the board regarding the equipment available for the ships was to be binding on the parties.

e. Any ships having claims against them in excess of $2,100 would be excepted from the terms of the contract; plaintiff's bid limited the foregoing to twelve ships.

f. If the board was not able to make delivery of any vessel and pass the required papers (re title) the plaintiff would have the option to accept at full purchase price such performance as the board was able to make or to except the vessel from the operation of the contract, but the board was not to be liable to the plaintiff for damages because of the board's inability to perform in whole or in part.

g. Plaintiff was not to assign the contract without the consent of the board. The board would not withhold its consent to an assignment if in its judgment the proposed assignee was financially responsible, would agree to the terms of plaintiff's contract and furnish a bond similar to plaintiff's bond; the assignment not to release the plaintiff or its surety.

The terms of the contract proposed by plaintiff which the plaintiff wanted the board to execute (filed herein as defendant's exhibit 16 and made a part hereof by reference), differed from plaintiff's bid in the following respects:

a. At all times from and after the date of the contract, the plaintiff was to have free access to all the ships, with full authority to remove from any ship any machinery, equipment, spare parts, and stores then on shore. This provision would have given the plaintiff the right to remove any or all equipment and stores before furnishing a bond under the contract. The proposed contract gave plaintiff 20 days from the date of the contract to furnish its bond.

Therefore plaintiff could have removed and sold any machinery, equipment, and stores during the 20-day interval from the date of the contract to the date of furnishing its bond.

b. Full right on behalf of plaintiff to assign the contract in whole or in part to anyone to whom it might desire. (If plaintiff had been granted this privilege the board would not have known with whom it might have to deal. The plaintiff's bid contained no such provision as the foregoing.)

On August 23, 1921, the chairman of the board, A. D. Lasker, granted plaintiff further time and advised it by letter of that date as follows:

> You claim to have certain rights with reference to the purchase of the wooden ships belonging to the United States Shipping Board and the Shipping Board denies that you have such rights. Nevertheless, it is agreed that the status quo shall be maintained without prejudice to the rights of either side, pending an effort to arrive at a satisfactory contract and that the resolution of the board of the 19th instant shall be extended until Monday, August 29th.

Negotiations still continued between the plaintiff and the Shipping Board with the result that on August 23, 1921, the plaintiff agreed it would go ahead with the purchase of the ships under its bid, if the inventory, which the board was getting to show what equipment had been taken off the ships, was satisfactory to plaintiff. Later, on September 8, 1921, the plaintiff agreed that it would pay $2,400 each for the ships.

After negotiations reached this point there were successive extensions of time to September 16, 1921, when, on that date, Chairman Lasker in a letter to plaintiff, substantially worded the same as his letter of August 23, extended the time until "September 29th at noon."

At meetings of the board from August 23 to September 27, 1921, the board considered and refused to concede any of plaintiff's contentions. At the meeting of the board on September 27, 1921, the whole matter of the negotiations which had been carried on with plaintiff to that date with reference to the sale of ships to plaintiff was considered and, in addi-

tion to the actions which had previously been taken, the board decided after investigation, and after obtaining advice from its counsel, as well as outside legal advice, that no appraisement of the ships had been made by the board as required by section 4 of the Merchant Marine Act of June 5, 1920, which authorized the sale of ships, and, accordingly, on that date the board unanimously adopted the following resolution and delivered a certified copy thereof to plaintiff, as follows:

> WHEREAS, the Board has heretofore received an offer from the Ship Construction and Trading Company, Inc., to purchase certain wooden ships, and
> WHEREAS, certain negotiations have taken place with respect thereto, and
> WHEREAS, the Board has been advised by counsel that it is without legal authority to accept the offer of the Ship Construction and Trading Company or to enter into a contract with said Company pursuant to the offers or negotiations heretofore had,
> NOW, THEREFORE, BE IT RESOLVED, that all offers of the Ship Construction and Trading Company, Inc., for the purchase of said ships be refused and that the Board decline to enter into a contract for the sale of said ships to the Ship Construction and Trading Co., Inc., pursuant to any offers of said Company or any negotiations heretofore had therewith.

By this resolution the board declined to negotiate further with plaintiff or to enter into any contract with plaintiff for the sale of the wooden ships and no contract for such sale has subsequently been entered into between the parties.

After receipt of the above-quoted resolution of September 27, the plaintiff on September 28, 1921, signed the contract form which the board had theretofore proposed prior to September 27, 1921 (exhibit 11), and sent the same to the board with the following letter dated September 28:

> GENTLEMEN: We were astonished to receive today a communication dated yesterday, signed by your Secretary, quoting what is stated to be a resolution adopted unanimously by you on the 27th instant, whereby you undertake to cancel your former actions on our bid for the wooden ships. We notice that no mention is made of the disposition of the certified check we deposited with you nearly two months ago with our bid.

We protest the action taken as being not merely illegal but unfair and refuse to be bound by it in view of our agreement with you of September 16th signed by your Chairman, that the status quo between us shall be maintained and that your resolution of August 19th shall be extended until September 29th at noon, which gives us until that time to sign the form of contract submitted to us with your resolution adopted August 19th, 1921.

Your two letters of the 16th and 27th are so contradictory as to not be consistent with the good faith we have a right to expect in you, and we express the hope that your resolution of September 27th may be rescinded without the necessity of an appeal on our part to the courts to protect us against a governmental action so thoroughly un-American.

We deliver you herewith duly executed by us the contract tendered us with your resolution of August 19th, and hereby respectfully demand that it be executed by you promptly and a copy delivered to us on the day of such execution by you.

Yours very truly,

THE SHIP CONSTRUCTION & TRADING CO., INC.,
By FRANK J. FULTON, *President.*

This contract form had made 266 ships the subject matter of the proposed sale excepting therefrom—

(a) Any vessels against which claims are now pending in the amount of Twenty-One Hundred Dollars ($2,100) or more, provided the seller notifies the buyer in writing within thirty days of the date hereof of the names of any such vessels;

(b) Not to exceed fifty vessels provided they shall be required prior to October 10, 1921, for use as a part of the construction of a pontoon bridge over the Hudson River. The buyer and seller will confer on designation of the vessels to be excepted under this clause (b) but the designation in writing to be given to the buyer by the seller prior to October 15, 1921, shall be binding and conclusive on the parties;

(c) Two of the three steamers *Awensdaw*, *Diana*, and *Dertona*, provided they shall within thirty days from the date hereof be delivered to Clinchfield Navigation Company in the settlement of a claim of that company against the seller, and notice be given to the buyer.

Appended to this contract form and made part thereof was a list of 266 vessels, which were all embraced in the original 285 vessels advertised for sale and bid on.

Included in the list of 266 vessels were the eight surrendered for liens, and so listed in finding 3 herein. These eight are not included in plaintiff's claim of 268 vessels.

Included in the list of 266 vessels were the fifty for use in construction of a pontoon bridge, which were never applied to that purpose, nor withdrawn from sale to plaintiff (finding 3), and are included in plaintiff's claim of 268 vessels.

The two ships mentioned in Article (c) of the contract are included in the list of 266 vessels, and are not included in the claim of 268 vessels.

There are not included in the 266 vessels the ten vessels sold in Europe (finding 3), on which plaintiff claims.

There is not included in the list of 266 vessels the *Fairfield* nor the *Sturgeon Bay*, both referred to in finding 3 as included in plaintiff's claim.

There are included in the list of 266 vessels both the *Balliett* and the *Coconino* (finding 3), included in plaintiff's claim of 268 ships.

Subtracting from the list of 266 ships appended to this contract form, plaintiff's exhibit 11, the eight ships surrendered for liens, the four ships that had claims in excess of $2,100 pending against them at the time involved herein—to-wit the *Campello*, *Alderman*, *Calala*, and *Nawitka*, which are included in the list of the 266 vessels above referred to—the two ships transferred to Clichfield Navigation Company in settlement of their claim, and the *Balliett* and *Coconino*, 250 ships were left available for sale to the plaintiff.

8. On October 8, 1921, the Shipping Board informed plaintiff that it was prepared to return the check for $60,270 deposited with the board and asked for directions. The check was signed by Alderson and the Shipping Board desired an agreement as to whom the check was to be returned. On February 13, 1922, Alderson requested that the check be returned to him and the plaintiff consented to transmittal

of the check to Alderson, such action to be without prejudice, and the board thereupon sent the check to Alderson.

9. In August of 1922 the Shipping Board caused an appraisement to be made of the wooden fleet as a whole. This appraisement was at $2,500 a vessel, stated as an average price.

10. On September 12, 1922, at a competitive sale, the Shipping Board sold, out of the fleet of 268 ships in dispute, to one George D. Perry 226 wooden ships at $3,318.58 a ship "as is and where is," on condition that they be promptly dismantled and not operated as steamships.

On October 16, 1922, the Shipping Board sold to Perry, at substantially the same terms, four other wooden ships; on March 23, 1923, two others; on April 28, 1923, one other; and, on August 1, 1923, one other and one purchased in Germany, a total of 235 ships; all at an average price of $3,318.58, included in the fleet of 268 ships.

Of the ships heretofore mentioned by name, the sale to Perry included only the *Alderman*, *Calala*, *Balliett*, and *Coconino*.

The ships were purchased without warranty or guaranty as to their condition, capacity, equipment, tonnage, correctness of their description, or otherwise. The ships were purchased by Perry for the Western Marine & Salvage Company. That company, with the assistance of Ford, Bacon & Davis, a New York engineering firm, and James L. Crandall, president of Crandall Engineering Company, scrapped the ships, except eight which it sold for $2,000 each, and incurred a loss of $281,098.80 on the undertaking, or an average loss of $1,196.16 a ship.

Between December 30, 1921, and June 30, 1922, the defendant, under contracts with nine several firms, caused 18 of the fleet of 268 ships to be scrapped. Under these contracts the net receipts realized amounted to $37,106.08, which is an average of $2,061.45 for each vessel. The net receipts were determined by deducting from the gross receipts obtained from the sale of the material scrapped only the cost of direct labor and superintendence.

11. There was no established market value for the vessels described in plaintiff's bid. The fair and reasonable value

of the fleet of 268 ships as a whole at the time of plaintiff's bid, and at all times thereafter to and including September 27, 1921, did not exceed the amount bid, that is to say $2,100 a vessel. The evidence of record does not establish what profit, if any, plaintiff could have realized on the ships as a whole if they had been delivered to it in accordance with its bid or in accordance with the contract first proposed but later withdrawn by the board before acceptance.

The separate value of machinery, equipment, spare parts, and supplies on board the vessels or on shore, and in any way appertaining to the vessels, is not satisfactorily proved.

ON DEFENDANT'S COUNTERCLAIM

12. The defendant filed a counterclaim in this case seeking to recover an overpayment made to plaintiff in connection with contracts for two wooden cargo-carrying hulls, which overpayment arose out of the following facts:

The United States Shipping Board Emergency Fleet Corporation, hereinafter referred to as the Fleet Corporation, was created and organized on April 16, 1917, by the United States through the United States Shipping Board pursuant to specific authority conferred by the Shipping Act of September 7, 1916, 39 Stat. 728, 731. Sections 5, 11, and 13 of that act are as follows:

> SEC. 5. That the board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, *for use as naval auxiliaries or Army transports, or for other naval or military purposes*, and to make necessary repairs on and alterations of such vessels: * * *
>
> SEC. 11. That the board, if in its judgment such action is necessary *to carry out the purposes of this Act*, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed $50,000,000.00. The board may, for and on be-

half of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto *necessary to protect the interests of the United States and to carry out the purposes of this Act.* * * *

SEC. 13. * * * The proceeds of such bonds [meaning the Canal bonds authorized to be sold to provide for the capital stock of the corporation] and the net proceeds of all sales, charters, and leases of vessels and of sales of stock [meaning the capital stock of corporation] made by the board, and all other moneys received by it from any source, *shall be covered into the Treasury* [meaning the United States Treasury] to the credit of the board, and are hereby permanently appropriated for the purpose of carrying out the provisions of sections five and eleven. [Italics ours.]

By this act Congress created the Shipping Board and authorized it to construct or acquire ships directly or through one or more corporations formed by it, in contemplation of the possibility of war, and the act provided that any corporation so organized should stand dissolved at the expiration of five years from the conclusion of the war. The Fleet Corporation was created as a governmental agency to construct a fleet of vessels to meet a wartime emergency with its every action government-controlled, and all its assets supplied from government sources.

From the time of its organization, the Fleet Corporation has always been managed and controlled by the Shipping Board and the officers and directors of the Fleet Corporation were composed of officers of the board. The Fleet Corporation was an operating agency of the Shipping Board. The Fleet Corporation has never done any business or conducted any operation except on behalf of the United States. It was an instrumentality of the government and in the contracts and transactions out of which the defendant's counterclaim grew and upon which it is based, as hereinafter mentioned, the Fleet Corporation was acting on behalf of and as an instrumentality of the United States through the Shipping Board. From the time of its organization, the Fleet Corporation has been financed and all its expenses have been paid out of public funds of the United States authorized and appropriated by Congress. The emergency

shipping fund provision of the Urgent Deficiencies Appropriation Act of June 15, 1917, 40 Stat. 182, authorized the President to place orders for such ships or materials as the necessities of the government, to be determined by the President, might require during the period of the war and to exercise the powers and authority vested in him thereby and to expend the money therein and thereafter appropriated through such agent or agencies as he should determine from time to time. The pertinent provisions of the act are as follows:

> The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person. * * *
>
> The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time. * * *
>
> All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire.

At the time of the passage of this act the Fleet Corporation had been created and organized, and the proviso contained in section 4 of the act of June 15, 1917, 40 Stat. 183, discloses that Congress intended that the President should exercise the powers delegated to him through the Fleet Corporation, for that proviso stated that "all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said Corporation are now expended."

On July 11, 1917, the President, by Executive Order 2664, directed that the Fleet Corporation should have and exercise all power and authority vested in him by the act of June 15 applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, and all power and authority relating di-

rectly or indirectly to the construction or purchase of ships or materials therefor. After the Fleet Corporation, acting on behalf of the United States, had made the original contract of June 15, 1917, hereinafter mentioned, with plaintiff and after plaintiff had been engaged for more than a year in the performance of such contract, the President on December 3, 1918, issued a further Executive Order, #3018, delegating to the Shipping Board and the Fleet Corporation all powers granted to him by the acts of Congress relating to the emergency shipping fund approved on or prior to November 4, 1918. In paragraph 3 of this Executive Order, it was provided that—

> All acts heretofore done by said corporation or by said board with reference, respectively, to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes or any of them, be, and they are hereby, ratified and confirmed.

Between June 15, 1917, and July 1, 1918, Congress appropriated approximately $3,000,000,000 for the building, production, and purchase of ships and materials, and this sum was expended by the Fleet Corporation on behalf of the United States in carrying out the purposes for which it was created and organized.

On June 15, 1917, the plaintiff entered into a written contract, No. 16 W. H., with the United States Shipping Board Emergency Fleet Corporation under the terms of which plaintiff agreed to construct two wooden cargo-carrying hulls without propelling machinery, equipment, and auxiliaries. A true copy of this contract is in evidence as defendant's exhibit C–1, and is made a part hereof by reference. The contract is also made a part of the counterclaim as exhibit A. Art. 5 of this contract provided that if the contractor should materially fail to carry out the provisions of the contract and should continue in default for a period of 60 days after notice thereof from the Fleet Corporation or its inspectors, or if the contractor should fail to make progress on the work satisfactory to the Fleet Corporation, then the Corporation should have the power and right to enter into and take possession of the hulls and all materials

and appliances in connection therewith, and in a reasonable and economical manner, for account of the contractor, to complete the work called for in the contract at the yards of the contractor or otherwise; that after taking over the work in this manner, the Fleet Corporation should pay the contractor on account of profit only a reasonable rent for the contractor's yard and the facilities used. The plaintiff did not, as determined by the Fleet Corporation, make satisfactory progress with the work called for by this contract, with the result that on October 29, 1917, the Fleet Corporation notified plaintiff that it had directed the District Officer to enter and take possession of the hulls' materials and appliances, and advised plaintiff in part as follows:

> Referring now to Paragraph 5 of your contract No. 16, the Corporation informs you, in accordance with Paragraph 5 thereof, that you have failed to make progress on the work satisfactory to the owner, and therefore the Corporation has directed the District Officer to enter into and take possession of the hulls at your shipyard, and all materials and appliances in connection therewith, and has also directed him to complete the work called for under this contract at your yard or otherwise.
>
> In view of the facts as developed by the reports referred to that your shipyard is not equipped with the necessary facilities for the economical completion of the hulls under your contract, the District Officer has been instructed to shut down all work going on in your shipyard on account of this contract, for the present, in order that the corporation may incur no further loss on your account than is necessary and may determine what shall be the most economical manner of completing the work required under your contract.

By this action the Fleet Corporation terminated plaintiff's right to proceed further under the contract.

Thereafter, on November 22, 1917, the Fleet Corporation, acting for the United States, instead of itself completing the ship hulls, entered into another contract with plaintiff which was as follows:

> WHEREAS, on the 15th day of June 1917, a contract was entered into between the SHIP CONSTRUCTION AND TRADING COMPANY, INC., herein called the Contractor,

and the UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, herein called the Owner, for the construction by the contractor at Stonington, Connecticut, of two ships for the owner, and

WHEREAS, the Corporation, in accordance with a provision of said contract, by order dated October 29th, 1917, ordered all work in connection with said contract stopped, for reasons stated in said order, and

WHEREAS, the contractor is desirous of being permitted to continue work under said contract.

WITNESS, This supplemental agreement between the said contractor and the said owner:

First: The owner shall hereafter advance, control, and pay out all expenditures which are to be made in the construction of said ships and for this purpose shall maintain in the yards of the contractor two men, one who for convenience is called an auditor and the other an inspector. The inspector shall pass upon and approve all bills to be paid by the owner; he shall be consulted by the contractor in regard to the purchase of all materials, tools, and supplies which are deemed necessary for the completion of the said two ships, and no order shall be placed without the written approval of said inspector.

Second: The owner agrees to pay the indebtedness which the contractor now owes Messrs. Hayes and Anderton now standing against certain lumber necessary in the construction of such ships now in the contractor's yard, it being understood that said indebtedness does not exceed the sum of Sixty-Three Thousand, Five Hundred Dollars ($63,500), and that the owner is to receive a release from Hayes and Anderton of all lumber and claims so far as they affect these two ships. In addition, the owner agrees to pay for certain lumber not unloaded in the yard, the purchase price of which, amounting to Five Thousand, Two Hundred Sixty-Seven Dollars and Thirty-three cents ($5,267.33), has been guaranteed by said Hayes and Anderton. The contractor represents that the total quantity of said lumber if in excess of one Million, Five Hundred Thousand feet (1,500,000).

Third: The contractor, through the chairman of the Board of Directors, Mr. M. L. Gilbert, shall furnish a list of all executive officers and superintendents of construction to the owner, together with the salaries proposed to be paid each, and the owner shall have the right to reject any of the said executive officers or superintendents of construction or modify the salaries paid to

any such officers, whereupon the chairman of said Board of Directors, Mr. M. L. Gilbert, must submit the names of others until executive officers and superintendents of construction are found who are satisfactory to the owner.

Fourth: The owner shall have the use of all of the yard and all equipment in the yard, but such equipment as is not required by the owner may be used by the contractor in its private work, it being understood that the contractor shall have the right to do private work, which must not, however, interfere in any way with the owner's work. The various shops and work places may be used jointly by the owner and the contractor, but the owner's work shall at all times have preference in said use.

Fifth: As the owner's work requires at least three-fourths of the area of the yard, the owner agrees to pay during the period of construction of the said ships three-fourths of the ground rent beginning November 1st, 1917, the total annual ground rent being understood to be Three Thousand, Seven Hundred Dollars ($3,700).

Sixth: The time for the delivery of the first ship is hereby extended to June 15th, 1918, and the time for delivery of the second ship to July 15th, 1918.

Seventh: When the construction of the two ships is entirely completed then the materials and the lumber which shall have been paid for by the owner shall, at the option of the owner, be taken over by the owner at the reasonable market value thereof, or shall be sold for the account of the contractor at such reasonable market value, in which case the contractor shall be given due credit therefor on the books of the owner. Should the cost of the ships, after due allowance has been made for the unused materials as above provided for, be less than the contract price, then the owner agrees to pay the contractor the difference between the cost and the contract price; it being understood that such sum shall be the contractor's profit; but should the cost of the ships as thus ascertained be greater than the contract price, then the contractor must pay the owner the excess of cost over the contract price.

Eighth: It is agreed that all sums paid in accordance with the provisions herewith shall be considered payments on account of the contract price stated in the contract, dated June 15, 1918.

Ninth: The contractor hereby releases the owner from all claims of every nature and description arising in connection with the contract or out of the order stopping the work thereunder.

In WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their duly authorized officers, respectively, this 22d day of November, 1917.

The construction of the hulls was completed under the above contract at the expense of the Fleet Corporation and out of the public funds authorized by Congress for work, labor, and materials furnished by plaintiff under the contracts and paid for by the Fleet Corporation, and such corporation overpaid plaintiff under the terms of the contract of November 22, 1917, in the amount of $299,918.27 which plaintiff agreed to repay under the seventh article of this contract. All payments made to plaintiff were made by means of checks drawn by the Fleet Corporation on various deposits of funds made available to it pursuant to the act of Congress of September 7, 1916, and subsequent acts of Congress. The plaintiff's shipyards which had been taken over by the Fleet Corporation were turned back and released to plaintiff on July 28, 1919. The cause of action for the overpayment of $299,918.27 made to plaintiff, for which the defendant makes counterclaim, accrued July 28, 1919. The written acceptances, dated October 10, 1919, of the wooden hulls constructed under the aforementioned contracts stated in part that—

This is to certify that on this 10th day of October 1919 there has been received * * * a hull known as "ASHLAND" (and "ALTURA") * * * and which said delivery, this day made, is an acceptance by the United States of said hull * * *.

These acceptances were signed as follows:

For the United States, W. M. Rice, District Manager (as special agent, United States Shipping Board).

The Fleet Corporation at all times involved in this counter suit was a corporation organized under the laws of the District of Columbia. All its stock at the time of its incorporation was owned, and ever since has been owned, by the United States, and the United States at all times

financed the Fleet Corporation. Title to the two hulls constructed under the contracts hereinbefore mentioned was taken in the name of the United States.

The parties stipulate that if recovery on the counterclaim is not barred by the statute of limitation and if the United States is entitled to assert the claim for the overpayment made to plaintiff, then there is due and owing the defendant, from plaintiff, on the counterclaim the principal amount of $299,918.27. The plaintiff has waived of record any and all claims that it may have against the United States arising out of the two contracts of June 15 and November 22, 1917.

The Merchant Marine Act, approved June 5, 1920 (41 Stat. 988–990, 993), repealed the shipping fund provision of the Appropriation Act of June 15, 1917, but provided that such repeal should be subject to the following limitations:

> (1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, * * *.
>
> (2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of Subdivision (c) of this section, as if this Act had not been passed. * * *
>
> (c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed. * * *
>
> SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pur-

suance of authority conferred by the Acts or parts of Acts repealed by Section 2 of this Act, * * * are hereby transferred to the board. * * *.

* * * * *

SEC. 13. That the board is further authorized to sell all property other than vessels transferred to it under section 4 upon such terms and conditions as the board may determine and prescribe.

SEC. 14. That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in Section 2 of this Act, * * * shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds * * * shall be covered into the Treasury of the United States as miscellaneous receipts. * * *

On February 28, 1922, the Shipping Board Emergency Fleet Corporation stated an account with reference to the cost of construction of the two hulls in accordance with the two contracts which account showed a balance of $488,310.24 due from plaintiff. The account, as so stated, and a demand for payment by plaintiff of the balance shown to be due, which balance included the amount here stipulated to be due, were duly delivered to plaintiff on or before March 18, 1922. Subsequent demands for payment were made by the General Counsel of the United States Shipping Board, and acting also as special counsel for the United States Shipping Board Emergency Fleet Corporation. No payment thereon was ever made by plaintiff.

The court decided, as a conclusion of law, that plaintiff was not entitled to recover.

The court further decided, as a conclusion of law, that the defendant on its counterclaim was entitled to recover the principal sum of $299,918.27 with interest thereon at six percent per annum from March 18, 1922, to April 1, 1940, in the amount of $324,561.62, or a total amount of $624,479.89.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff claims that on August 9, 1921, the United States through the Shipping Board unconditionally accepted its

Opinion of the Court

bid for 268 wooden ships with machinery, equipment, spare parts, and supplies, as amended by its bid of August 5, 1921, and that such bid and such alleged actions constituted a legal and binding contract between the parties which it is alleged the defendant breached between August 9 and September 27, 1921, by refusing to deliver the ships in accordance with the terms and conditions of the bid as amended. Whether there was a legal and binding contract between the parties constitutes the first and principal question in plaintiff's case.

Plaintiff computes its claim as follows:

Alleged fair market value of—		
100 ships for operation at $13,000 each		$1,300,000
168 ships for dismantling, $10,500 each		1,764,000
		3,064,000
168/200ths of $900,000, the alleged fair market value of equipment, spare parts, and supplies belonging to the ships stored for safekeeping when the ships were laid up and not put on the ships to be dismantled		756,000
Expenses for attorneys, engineers, officers' expense, and expenses of making preparations to perform incurred between August 9 and September 27, 1921		10,000
Interest on $10,000 from September 27, 1921		10,000
		3,840,000
Less:		
Contract price	$562,800	
Alleged repairs to 100 ships having an alleged market value for operation of	78,902	
		641,702
		3,198,298

The essential facts as established by the record are set forth in the findings. Plaintiff bases its claim for the amount above stated solely on the contention that the Shipping Board on August 9, 1921, adopted the resolution embodied in the document furnished to plaintiff by the secretary of the Shipping Board on August 12, 1921, which is set forth in finding 4, and that its bid and this resolution, which plaintiff contends was an unconditional acceptance by the board, constituted a legal and binding contract. We are of opinion that this contention is not sustained by the

record. As a general rule when a written offer on specific terms and conditions is made and the terms and conditions proposed therein are accepted without further conditions, and, upon the basis of such action, nothing further remains to be done, except the signing of a formal contract embodying such terms and conditions, there exists a valid contract between the parties in the absence of a statute or regulation imposing further requirements. It is further the general rule that if parties dealing with each other with the view of arriving at a contract intend that their negotiations shall be finally reduced to writing and signed by them as evidence of the terms and conditions of the agreement, there exists no binding contract until the written contract setting forth such terms and conditions is executed. The fact that, as in the case at bar, a representative of the government or the governmental agency mistakenly and without authority incorrectly advises the other party, or the bidder, that its proposition or bid has been accepted by the government, or such governmental contracting agency, does not bind the government, and such action gives the other party no rights in the premises to any greater degree than exist upon the basis of the action which was actually taken by the agency or board possessing the authority to fix the terms and conditions upon which the government shall be bound. Cases to this effect are uniform and the proposition mentioned is so well established as not to require citation of authority. It is also an established proposition that estoppel cannot be set up against the government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the government.

The Shipping Board, which was the agency authorized by statute to act for the United States in the sale of the wooden fleet at private or public competitive sale, was composed of seven members. The evidence clearly shows that after the bids were opened on July 30, 1921, the board without acting upon any of the bids or upon the general question of the sale of ships or the terms and conditions upon which they would be sold directed one of the commissioners of the board and the assistant to the chairman of the board to

investigate and consider the terms and conditions of the bids in connection with the information and data disclosed by the records of the Emergency Fleet Corporation, all of which were in possession of the board. The Shipping Board, as such, did not consider or take any action with reference to the general question as to the sale of the wooden ships or with reference to plaintiff's bid until August 9, 1921. In the meantime the plaintiff, who was the highest bidder for the largest number of ships, submitted to the Board on August 5, 1921, an amended bid in which certain of the terms and conditions of the original bid were modified. At a meeting of the board, at which six commissioners were present, the question of sale of the wooden ships in connection with plaintiff's bid was taken up by the board for consideration. At this meeting, as the record discloses, the outstanding questions before the board, and which it then took under consideration, were, in substance: first, should the board at that time authorize and proceed with the sale of the wooden fleet; second, should the board then proceed to take definite and final action to bind the United States on a sale of the fleet; and, third, should it fix and finally act upon the terms and conditions upon which a stated number of ships and/or equipment would be sold to plaintiff under its bid. There was a great deal of discussion with reference to these matters by the board. The meeting of the board at which these questions were considered and discussed lasted from 9 to 11:15 a. m., and from 1:15 to 4:20 p. m. During the course of the general discussion with reference to these matters it was suggested by a member of the board that a resolution indicating the action which the board desired to take be prepared; however, the board did not direct that this be done and the discussion continued. Commissioner Plummer was not always present in the board room; he was frequently called out, because of other duties, and he was absent from the meeting during much of the discussion of matters by the board. Later, during the meeting, Commissioner Plummer drafted a proposed resolution substantially in accordance with the document subsequently prepared and delivered to plaintiff on August 12, 1921, as set forth in finding 4, but

this resolution was not acted upon or approved by the board as drawn. No special consideration was given specifically to it and no direct action was taken solely upon it by the board, and the discussion continued. The findings set forth the nature and extent of the action finally taken by the board with reference to plaintiff's bid and the questions considered in connection therewith. These findings show that the board did not, and certainly not without conditions and limitations, adopt a resolution or take any action specifically accepting the terms and conditions of plaintiff's bid; and, that the board did not adopt any resolution in the language of the purported resolution delivered to plaintiff and upon which it relies as constituting, with the bid of August 5, 1921, a valid and binding contract between the parties.

With reference to the nature of the action taken by the board at the meeting on August 9, 1921, A. D. Lasker, chairman of the board, testified in part as follows:

> The matter, if I remember now, came up at a subsequent meeting [August 9, 1921], with a resolution prepared by Mr. Plummer authorizing the sale. We had a general conversation of a very general nature, and I remember distinctly, and in this my memory is clear, that I said before I would vote for any final sale I wanted to submit the matter to the President. I had not been long in office. I didn't know exactly how far my powers went. I didn't know what the background of this thing was, and maybe he might want to submit it to the Congress. And I remember someone—I forget whom—there were a lot of loose tail ends; and after a long rambling discussion, it was decided we would take a vote on the resolution based, however, on the loose ends being tied up, and my submitting it to the President. The whole meeting was informal. * * *.
>
> Q. Was that resolution, Mr. Lasker, acted upon at that meeting?
>
> A. Informally only, and with conditions surrounding it that gave no man the right to say that Board had authorized a sale. I refer to that because two or three days later, on the Mayflower, when I saw in the Washington Post an account of the sale, I expressed to the President my utter surprise and indignation and discouragement that such a thing could happen.

Commissioner Lissner of the Shipping Board testified in part as follows:

> Q. I show you paper marked plaintiff's exhibit No. 3, purporting to be a resolution alleged to have been passed by the United States Shipping Board on that date. Will you state whether or not that resolution was passed on that date?
> A. According to my understanding, it was not.
> Q. Will you please state what did take place at that meeting with reference to that subject-matter?
> A. We were discussing the bids that had been received for the sale of the wooden fleet and what the policy of the Board should be, what action we should take in regard thereto. There was a good deal of discussion lasting a long time. During the course of that discussion the suggestion was made and generally approved that we should take a tentative vote upon the high bid, which is the discussion in this case, but that the vote would only be tentative, and that any action that we would take upon the matter would be subject to the approval of the President and Congress. That was my understanding of what we did. And later on, when I voted on this matter, I understood that I was voting simply on a tentative proposition with the limitations that I expressed.
> Q. Did you understand that the terms of that bid were definitely acceptable to the Board?
> A. I did not.
> Q. It had been threshed out or negotiated by anybody in behalf of the Board?
> A. I did not understand that the matter was in definite shape at that time for final acceptance at all.

Commissioner Thompson of the board testified in part as follows:

> Q. I show you a copy of the resolution which has been marked Plaintiff's Exhibit No. 3. Will you state whether or not that resolution was passed by the Shipping Board at that meeting?
> A. I am quite confident this resolution was never presented to the Board upon which I voted at any time.
> Q. Will you tell us in a way—I mean, tell us what happened at that meeting, what discussion there was at that meeting with reference to the bid of the Ship Construction Company?
> A. The whole question of the disposition of the wooden fleet was up. My recollection is very clear, and

I so contended when this matter has been discussed, that the vote taken that day was to ascertain the sentiment of the Board with respect to the disposition of the wooden fleet. Personally I had very pronounced views that there should be some Congressional authority. My recollection is distinct that the Chairman stated he wanted to discuss this matter with the President. There was considerable discussion, and I am not usually given to being misled at Board meetings, and I said "I want to duck under the table."

Q. Wanted what?

A. To duck under the table. It was a thing that greatly worried the Board, as to what disposition to make of the wooden fleet. A resolution had been introduced in Congress, I think, directing us to dispose of the wooden fleet by October 1. I felt that it was too serious a matter to hasten on, and I am quite assured that the vote taken that day was merely to test the sentiment of the Board as to how they felt as to the disposition of the wooden fleet.

I will say this, that had it been a direct question upon a resolution, I would most certainly have voted no.

Commissioner Chamberlain testified in part as follows:

Q. I show you what purports to be a resolution of the Shipping Board. Will you state whether or not that resolution was passed at that meeting?

A. The resolution, as I recall, was passed by the board at that meeting as a tentative proposition and in connection with the general discussion which was had.

Q. What am I to understand by that statement, Senator? Do you mean that particular resolution, without any qualifications, was passed?

A. No; the resolution was read by Mr. Plummer, and after this discussion, which had extended over several hours—I do not remember how many—it was passed as a part of the general discussion in connection with the disposition of wooden ships; and I think the minutes would have been proper if, in the preparation of them, they had stated that the resolution was only to become effective if the financial standing of these gentlemen was good, if the President approved and if the matter could be submitted in Congress, in some way, by resolution or otherwise. In other words, the resolution was a part of the whole general scheme with reference to the disposition of wooden vessels. That is the way I understand it. I did not understand that the resolu-

tion would be effective except on the conditions which were discussed and which I have named.

Q. What other things, if any, were to be fixed up, that you recall, or to be made certain as a part of that?

A. This bid, as I understand it, was made by this company upon an advertisement which called for the sale of the ships "as is, where is, and what is." It was discovered, because there had been no due appraisement, as I understand the term, that there was an immense amount of property that had been taken off the ships and was stored in different warehouses and other places. All of this had to be adjusted before the final contract of sale was entered into. Those were some of the things that Mr. Farley spoke of in his statement which has appeared here. All of that was to be adjusted as a part of the sale of these ships and the terms to be embodied in the contract, as I understood it.

Commissioner O'Connor testified in part as follows:

Q. Will you state whether or not the resolution was passed on that day at that meeting?

A. I would say not, the way it is drawn up in the paper.

Q. Will you tell the court what your understanding is of what happened at that meeting?

A. If I understand it rightly, the motion that was passed was to give the Committee power to trade. After several hours of negotiations they were then given power to trade.

The above testimony of the five commissioners, which is not contradicted by any evidence in the record, shows clearly that the action of the board was not an approval or adoption of a resolution unconditionally accepting plaintiff's bid in the language of the document which was later prepared by the secretary of the board and delivered to plaintiff on August 12, 1921.

Commissioner Plummer, who during the course of the meeting of the board on August 9, 1921, had prepared a proposed resolution substantially in accordance with the document later delivered to plaintiff on August 12, testified with reference to the matter in part as follows:

Q. Did you have a meeting of the board on August 9th after you had in the July 30th bid and the amendment of August 5th?

A. Yes, sir.

Q. Mr. Plummer, did you introduce a resolution in that meeting of August 9th, accepting the bid as amended of the Ship Construction & Trading Company?

A. I offered such a resolution.

Q. May I ask you if this is a copy of the resolutions which you then offered?

A. I should say it was.

Q. Mr. Plummer, were you present during all of that meeting of August 9th?

A. I can't say. At that time I had no secretary and so I was in and out a good deal.

Q. Were you present during a discussion of the Ship Construction & Trading Company's bid at that August 9th meeting?

A. Well, now, I cannot say.

Q. Mr. Plummer, was that resolution passed on that day by the board?

A. I so understood. I learned that some of my colleagues disagreed with me later.

In view of the foregoing and upon the facts as set forth in the findings, we hold that no legal and binding contract resulted from plaintiff's bid and the action which was actually taken by the board at its meeting of August 9, 1921. Where one authorized to do so receives and accepts a bid and awards a contract but whose action with reference to the contract to be executed between the parties is subject to approval by another and that approval is not subsequently given, no binding contract exists on which the United States may be required to respond in damages as for a breach. *Monroe* v. *United States*, 184 U. S. 524; *Cathell et al.* v. *United States*, 46 C. Cls. 368; *Horton* v. *United States*, 57 C. Cls. 395; *Jacob Reed's Sons Inc.* v. *United States*, 60 C. Cls. 97; *Burney Axe, Trading as B. Axe & Co.* v. *United States*, 60 C. Cls. 493; *American Electric Co.* v. *United States*, 60 C. Cls. 993.

The record shows that the Shipping Board did not at any time subsequent to August 9, 1921, take any action which would constitute the making of a contract with plaintiff, either on the terms of plaintiff's bid or on any other definite terms.

Opinion of the Court

In view of our conclusion that there was no contract between the parties upon which a suit for damages could be based, it is unnecessary to discuss in detail the contentions of plaintiff with reference to the number of ships, etc., to which it alleges it was entitled and the fair market value thereof and, also, the contention of plaintiff that the board had duly and properly made an appraisal of the ships as required by the act of June 5, 1920. We have studied the record in this regard and carefully considered plaintiff's contentions and our decision as to the facts established by the record with reference thereto is disclosed in the facts set forth in findings 5 and 11. Plaintiff's contentions with reference to market value are not established by any substantial and convincing evidence with reference, either to the value of the ships for dismantling or for probable profitable operation. The record shows that in September 1920 there was a complete collapse of the shipping industry and that thereafter and during 1921 there was no market for wooden ships for the purpose of operation and that the cost of maintaining and operating them would, in all probability, equal or exceed any earnings therefrom. But in addition to this the record establishes that 235 ships of the 268 on which plaintiff bid, and which constitute the subject matter of this suit, were sold to one George D. Perry in 1922 and 1923 for dismantling at an average price of $3,318.58 and that the purchaser sustained a loss of $281,098.80 on the undertaking, or an average loss of $1,196.16 a ship. This, we think, is the best evidence of the fair market value of the fleet as a whole. On this evidence the fair value of the ships was not in excess of $2,122.42 each. Plaintiff's testimony with reference to the matter of profitable operation of some of the ships on which it bid is conjectural and based on estimates not supported by any substantial or convincing facts.

With reference to the matter as to whether an appraisement of the ships had been made, as required by the statute, the record shows that when this matter was taken up by the Shipping Board for consideration it decided upon the basis of all the documents and facts upon which plaintiff relies,

and upon the basis of advice of its counsel, as well as upon legal advice obtained by the board from outside sources, that the board had not made, or had made for it, any appraisement of the ships as required by the statute. Upon the record we certainly are not justified in overruling this considered action of the board. In addition, the evidence shows that when the matter as to whether the board had made a proper appraisal of the ships came up the board did not desire to terminate its negotiations with plaintiff in an effort to arrive at a contract of sale and that its action on September 27, 1921, in which it terminated the negotiations and declined to enter into any contracts with the plaintiff, was reluctantly taken.

This leaves for consideration the question whether the defendant is entitled to maintain and to recover on its counterclaim. The principal amount due the defendant by plaintiff is stipulated to be $299,918.27, on which defendant also claims interest. In view of the facts set forth in the findings we think an extended discussion as to whether the defendant owns the counterclaim and may legally assert it and whether it is barred by the statute of limitation is not necessary. The fact that the contract, under which the overpayment made the subject of the counterclaim, was entered into with plaintiff by the Fleet Corporation in its corporate capacity does not, in the circumstances disclosed by the record, preclude the defendant from maintaining its countersuit. *Crane et al.* v. *United States*, 73 C. Cls. 677, 684–5, 689. Nor does the fact that the contract did not state that the Fleet Corporation was representing or acting as the agent for the United States preclude recovery. The Fleet Corporation was created by the United States through the Shipping Board for the purpose of providing ships desired and needed by the United States. The Fleet Corporation was owned, and its every action controlled, by the government. Officers and directors of the Fleet Corporation were composed of officers and employees of the Shipping Board and all the transactions by the Fleet Corporation, including those out of which this overpayment grew, were financed by the United States from public funds authorized and ap-

propriated by Congress. Moreover, the contract of November 22, 1917, in the performance of which this overpayment of $299,918.27 was made, was entered into, and executed after the President of the United States, pursuant to law, had delegated to the Fleet Corporation all the powers vested in him and had ratified and confirmed all the acts and transactions of the Fleet Corporation. We need not consider whether, if the claim asserted by the defendant in its countersuit had remained in the hands of the Fleet Corporation beyond the general statutory period of limitation for bringing suit, that such limitation statute would bar recovery by the defendant. The provisions of the Merchant Marine Act of 1920 transferred this claim to the Shipping Board and since the cause of action on the overpayment did not accrue until July 28, 1919, it is clear that the same was not barred on June 5, 1920. It is likewise clear that the right of the United States to sue upon the claim is not barred for the reason that the statute of limitation did not run against the United States after June 5, 1920.

The United States is entitled to recover interest. *Billings* v. *United States*, 232 U. S. 261. In the Seventh Article of the contract of November 22, 1917, plaintiff agreed to repay to the Fleet Corporation any overpayment that the Fleet Corporation might make in paying all the expenses of completing the hulls under the terms of that contract. Plaintiff's shipyards, which in the meantime had been taken over by the Fleet Corporation, were turned back to plaintiff July 28, 1919, and the hulls were accepted by the United States in October. The Fleet Corporation stated an account in the matter on February 28, 1922, and delivered the same to plaintiff and demanded payment of the balance shown to be due the Fleet Corporation on March 18, 1922. On that date interest in favor of the creditor commenced to accrue. See *Enright & Fletcher* v. *United States*, 73 C. Cls. 416. The amount of interest at 6 percent per annum to which the defendant is entitled on the principal amount due by plaintiff from March 18, 1922, to April 1, 1940, the date of judgment, is $324,561.62. The defendant is therefore entitled to recover $624,479.89. Judgment will be entered accordingly. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge;* and WILLIAMS, *Judge*, took no part in the decision of this case.

THE MANUFACTURERS LIFE INSURANCE CO. v. THE UNITED STATES

[No. 43589. Decided April 1, 1940. Plaintiff's motion for new trial overruled October 7, 1940]

On the Proofs

Income tax; foreign life insurance company; deduction of tax-free interest and of dividends.—Where plaintiff, a foreign life insurance company, doing business in the United States, during each of the taxable years in question received interest exempt from taxation and also dividends from domestic corporations, and where in computing plaintiff's taxable income for said years from sources within the United States the Commissioner deducted from its gross income from all sources the amount of said interest and dividends and made other deductions allowed by law, and applied to the resulting net income the percentage which plaintiff's reserve funds on business transacted within the United States was of the reserve funds held by it at the end of the taxable year upon all business transacted, it is held that such determination of taxable net income was in accord with the intendment of Congress as expressed in Section 203 of the Revenue Act of 1928.

Same; right to do business.—A foreign corporation has no right to do business within the United States except by consent of the United States and upon such terms and conditions as may be imposed.

Same; differentiation.—The differentiation in the tax acts between foreign corporations and domestic corporations is a reasonable classification.

Same.—A foreign corporation may be subjected to a different tax from domestic corporations of the same kind.

Same; constitutionality.—The rule for determining the amount of a foreign life insurance company's net income derived from sources within the United States is purely arbitrary, and may or may not be in accord with actual facts, but is not therefore unconstitutional under the Liberty Loan Act of September 24, 1917.

The Reporter's statement of the case:

Mr. John W. Townsend for the plaintiff. *Mr. A. R. Serven* was on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the basis of an agreed statement of facts:

1. Plaintiff, The Manufacturers Life Insurance Company, is, and at all times material to this suit was, a corporation duly organized and existing under the laws of the Dominion of Canada, maintaining its main office in the City of Toronto, Province of Ontario, Dominion of Canada. Plaintiff is, and at all times material to this suit was, engaged in the life-insurance business, doing business in several States of the United States as well as in Canada and elsewhere. Plaintiff is, and at all times material to this case was, a life-insurance company within the intent and meaning of section 201 of the Revenue Act of 1928. (45 Stat. 791, 842.)

2. The Government of the Dominion of Canada accords to a citizen of the United States the right to prosecute claims against such Government in its courts.

3. Pursuant to the provisions of the Revenue Act of 1928, and particularly pursuant to the provisions of sections 201, 202, and 203 thereof, plaintiff duly filed Federal income-tax returns, on the prescribed Form 1120–L, for the calendar years 1929 and 1930 with the Collector of Internal Revenue at Detroit, Michigan.

4. Plaintiff's return for the year 1929, as amended, disclosed an income-tax liability of $23,544.13, which was duly paid by the plaintiff to said collector in four installments as follows:

March 14, 1930	$5,963.63
June 13, 1930	5,963.63
September 8, 1930	5,653.23
December 13, 1930	5,963.64

Thereafter the Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, audited the plaintiff's return for 1929 and determined and assessed an additional tax in the amount of $1,205.78, which, together with interest in the amount of $132.83, was duly paid on January 30, 1932. No part of said 1929 taxes and interest, aggregating $24,882.74, has been refunded to the plaintiff, and the said sum has been covered into the Treasury of the United States.

5. Plaintiff's return for the year 1930 disclosed an income-tax liability of $24,518.58, which was duly paid by the plaintiff to said collector in four installments, as follows:

March 11, 1931	$6,129.65
June 10, 1931	6,129.65
September 11, 1931	6,129.64
December 12, 1931	6,129.64

Thereafter the Commissioner audited the plaintiff's return for 1930 and determined and assessed an additional tax in the amount of $1,611.09, which, together with interest in the amount of $165.87, was duly paid on December 27, 1932. No part of said 1930 taxes and interest, aggregating $26,295.54, has been refunded to the plaintiff, and the said sum has been covered into the Treasury of the United States.

6. During the year 1929 plaintiff received interest in the amount of $4,250.00, and during the year 1930 interest in the amount of $4,250.00, on $100,000 in par value of United States Fourth Liberty Loan 4¼% bonds, due 1933–1938, which interest was tax-free within the intent and meaning of section 22 (b) (4) and section 203 (a) (1) of the Revenue Act of 1928. During the year 1929 plaintiff received dividends in the amount of $12,550.00, and during the year 1930 dividends in the amount of $37,722.25 from domestic corporations other than corporations entitled to the benefits of section 251 of the Revenue Act of 1928 (45 Stat. 850), and other than corporations organized under the China Trade Act, 1922 (42 Stat. 849).

7. Plaintiff's reserve funds required by law and held by it at the end of the taxable year 1929 upon business transacted within the United States amounted to 14.109% of the reserve funds held by it at the end of said taxable year upon

Reporter's Statement of the Case

all business transacted. Plaintiff's reserve funds required by law and held by it at the end of the taxable year 1930 upon business transacted within the United States amounted to 14.357% of the reserve funds held by it at the end of said taxable year upon all business transacted.

8. In his final audit of plaintiff's income-tax returns for 1929 and 1930 the Commissioner computed the plaintiff's income from sources both within and without the United States, as follows:

GROSS INCOME

	1929	1930
1. Interest	$5, 053, 661. 02	$5, 385, 664. 78
2. Dividends on stock of foreign and domestic corporations	29, 245. 00	74, 612. 70
3. Rents	48, 466. 08	31, 779. 29
4. Total	$5, 131, 372. 10	$5, 492, 056. 77

DEDUCTIONS

5. Interest exempt from taxation	$4, 250. 00	$4, 250. 00
6. 4% of mean of reserve funds	3, 146, 496. 96	3, 515, 305. 40
7. Dividends	12, 550. 00	37, 722. 25
8. 2% of reserves held for deferred dividends	81, 997. 66	77, 581. 34
9. Investment expenses	220, 289. 01	245, 352. 24
10. Taxes	17, 189. 58	22, 913. 39
11. Other real estate expenses	12, 103. 05	32, 154. 11
12. Depreciation, obsolescence, and depletion	6, 163. 58	7, 891. 78
13. Interest on indebtedness	35, 611. 18	32, 223. 66
14. Total	$3, 536, 651. 02	$3, 975, 394. 17
15. Net income (item 4 minus item 14)	$1, 594, 721. 08	$1, 516, 662. 60

9. In his final audit of plaintiff's 1929 and 1930 returns the Commissioner computed plaintiff's tax liability as follows:

1929

Net income from sources within and without the United States, computed as shown in the preceding paragraph	$1, 594, 721. 08
Amount subject to tax (14.109% of above figure)	$224, 999. 20
Income tax at 11%	$24, 749. 91

1930

Net income from sources within and without the United States, computed as shown in the preceding paragraph	$1, 516, 662. 60
Amount subject to tax (14.357% of above figure)	$217, 747. 25
Income tax at 12%	$26, 129. 67

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10. On or about December 13, 1932, plaintiff duly filed a claim on the prescribed Form 843 for the refund of $2,925.87 of income taxes paid by it for the year 1929 upon the following grounds, among others:

> 3. Claimant's proportion of income on account of its business in the United States of $214,037.56, as shown in its said income-tax return for 1929, should be reduced by the following amounts:
>
> (a) The Commissioner of Internal Revenue, as the result of his determination of claimant's income-tax liability, has compelled claimant to pay a tax on 85.891% of the total exempt interest included by it in gross income of $4,250.00, or the sum of $3,650.37, which is not subject to income tax under Section 203 (a) (1) of the 1928 Revenue Act and the Constitution of the United States; and
>
> (b) Said Commissioner of Internal Revenue, also as the result of his determination of claimant's tax liability, has compelled claimant to pay a tax on 85.891% of the total dividends received from domestic corporations of the United States included by it in gross income of $12,550.00, or the sum of $10,779.32, which is not subject to income tax under Section 203 (a) (3) of the 1928 Revenue Act.

11. On or about August 6, 1933, plaintiff duly filed a claim on the prescribed Form 843 for the refund of $5,834.16 of income taxes paid by it for the year 1930 upon the following grounds, among others:

> 3. Claimant's proportion of income on account of its business in the United States of $204,321.50, as shown in its said income tax return for 1930, should be reduced by the following amounts:
>
> (a) The Commissioner of Internal Revenue, as the result of his determination of claimant's income tax liability, has compelled claimant to pay a tax on 85.643% of the total exempt interest included by it in gross income of $4,250.00, or the sum of $3,639.83, which is not subject to income tax under Section 203 (a) (1) of the 1928 Revenue Act and the Constitution of the United States, and
>
> (b) Said Commissioner of Internal Revenue also as the result of his determination of claimant's tax liability has compelled claimant to pay a tax on 85.643% of the total dividends received from domestic corporations of

the United States included by it in gross income of $37,-722.25, or the sum of $32,306.47, which is not subject to income tax under Section 203 (a) (3) of the 1928 Revenue Act.

12. Said claims for refund were considered and finally rejected by the Commissioner on or after July 9, 1935, plaintiff being notified of said action by registered letter dated July 9, 1935.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff is a foreign life insurance company. During each of the taxable years in question it received interest exempt from taxation in the amount of $4,250, and it also received in one year dividends in the amount of $12,550, and in the other year, in the amount of $37,722.25. In computing its net income from sources within the United States the Commissioner deducted from its gross income from all sources the amount of this interest and dividends and other deductions allowed by law, and applied to the net income so arrived at the percentage which its reserve funds on business transacted within the United States was of its reserve funds upon all business transacted everywhere.

The plaintiff insists that this was error and that the proper method of computing its net income subject to tax is to deduct from its gross income from all sources all of the deductions allowed by law, except the interest exempt from taxation and the dividends, and to then apply to the balance the prescribed percentage, and from this amount to deduct the interest and dividends received.

If this method is not followed, plaintiff insists that a portion of its tax-exempt interest and a portion of its dividends would be subjected to taxation. This, it says, first, is contrary to the proper construction of the applicable sections of the Revenue Act of 1928; and, second, that so construed, they are unconstitutional, because discriminatory against a foreign corporation in favor of a domestic one; and, third, with respect to the interest, it says, that this

would violate the exemption clause of the Act under which the interest-bearing bonds were issued, and that this cannot be done constitutionally.

We shall discuss these points in order.

Section 201 (b) of the Revenue Act of 1928 imposes a tax of 12 per cent on the net income of domestic life insurance companies, and a like tax upon the net income from sources within the United States of foreign life insurance companies. Section 202 (a) of the Act defines a life insurance company's gross income as "the gross amount of income received during the taxable year from interest, dividends, and rents." Section 203 (a) defines net income as the gross income less tax-free interest and dividends, as well as reserve funds, investment expenses, real-estate expenses, depreciation, other interest, and the specific exemption. Section 203 (c) sets out the formula for determining the amount of a foreign life insurance company's income derived from sources within the United States. It provides:

> In the case of a foreign life insurance company the amount of its net income for any taxable year from sources within the United States shall be the same proportion of its net income for the taxable year from sources within and without the United States which the reserve funds required by law and held by it at the end of the taxable year upon business transacted within the United States is of the reserve funds held by it at the end of the taxable year upon all business transacted. (45 Stat. 791, 844.)

In findings 8 and 9 there is set out the Commissioner's method of computing the plaintiff's tax. It will be noted that he followed precisely the rule laid down in sections 201 (b), 202 (a), 203 (a), and 203 (c). In order to determine its net income he deducted from its gross income as defined in section 202 (a) the items set out in subdivision (a) of section 203. To this balance he applied the percentage called for in subdivision (c) of that section.

The plaintiff insists, however, that the words "net income" in subdivision (c) of section 203 do not mean the same thing they mean in subdivision (a). We find no basis for such a conclusion. Section 203 specifically defines what is meant

by the term "net income." Having expressly defined it, that definition is the one to be applied wherever these words are used, unless there is a clear indication of a contrary intention on the part of Congress. Especially is this so where the words are found in the very same section which defines their meaning. In defining the words, Congress does not limit that definition to the net income of domestic life insurance companies. It applies "in the case of a life insurance company," without distinction as to whether it is foreign or domestic. The section in which it is defined deals not only with domestic life insurance companies, but also with foreign life insurance companies.

But plaintiff says that to give it this definition in the case of a foreign insurance company results in depriving the foreign insurance company of a portion of the deduction for tax-exempt interest and dividends, and that this was not intended by Congress. It says that to deduct the tax-exempt interest and dividends from its gross income and then apply the percentage to the balance is equivalent to applying the percentage to each item of its gross income and to each item of the deductions, which is of course true, and that, therefore, it only receives a deduction of that percentage of its tax-exempt interest and dividends.

On its face this conclusion would appear to follow, but this is not necessarily true, as we shall hereafter show. But whether true or not, it seems clear to us that this is the result intended by Congress. It is the result attained by following the procedure laid down, and Congress must have known that this result would follow.

But the plaintiff says that this is a discrimination against it in favor of domestic life-insurance companies, and that such discrimination is unconstitutional under the due process clause of the Constitution.

On page 32 of the record plaintiff sets out the Commissioner's computation of its tax liability, and in a parallel column shows that a domestic company with exactly the same income as plaintiff's income from sources within the United States, would pay a smaller tax by virtue of the deduction of the entire amount of the tax-free interest and dividends

as against a deduction of only about 14 percent thereof allowed plaintiff.

Even though there be this discrimination between domestic and foreign life-insurance companies, we do not think that this renders the statute unconstitutional. A foreign corporation has, of course, no right to do business in this country, except by its consent, and upon such terms and conditions as this country may impose. *Paul* v. *Virginia*, 8 Wallace, 168; *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181; *Munday, Trustee*, v. *Wisconsin Trust Co. et al.*, 252 U. S. 499; *Washington, ex rel, Bond & Goodwin & Tucker, Inc.*, v. *Superior Court*, 289 U. S. 361; and the conditions imposed may discriminate against foreign corporations in favor of domestic ones, *Ducat* v *Chicago*, 10 Wallace, 410; *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, *supra*. The differentiation between foreign corporations and domestic corporations is a reasonable classification. *National Paper & Type Co.* v. *Bowers*, 266 U. S. 373; *Barclay & Co., Inc.*, v. *Edwards*, 267 U. S. 442. A foreign corporation may be subjected to a different tax from domestic corporations of the same kind. *Northwestern Life Insurance Co.* v. *Wisconsin*, 247 U. S. 132, 138.

Finally, the plaintiff says that the Commissioner's computation of the tax, as the result of which it says it is deprived of a deduction of something over 85 percent of the amount of its tax-free interest, violates the provisions of section 7 of Chapter 56 of the Act of September 24, 1917, 40 Stat. 291, under the terms of which the Liberty Loan Bonds held by it were issued, and that this cannot be done constitutionally. That Act provided for the exemption from taxation of the principal and interest of the bonds issued thereunder.

It is true that the plaintiff has been allowed a deduction from its *statutory* gross income from United States sources of only about 14 percent of its tax-exempt interest, but it does not necessarily follow that the balance of this interest has been subjected to taxation. The rule for determining the amount of a foreign life insurance company's net income derived from sources within the United States is purely

arbitrary; it may or may not be in accord with the actual facts. The rule prescribed by Congress, applicable alike to all foreign insurance companies, was for the purpose of providing a reasonable and fair basis for a satisfactory determination of net income, and to avoid controversies and administrative difficulties in its administration; but it may or may not accord with the actual facts. The net income is ascertained by taking that proportion of its total net income which its reserve funds from business transacted within the United States bears to its total reserve funds. But its taxable gross income does not include premiums from insurance written, which is the only income which bears any relation to its reserves. Its taxable gross income is confined to interest, dividends, and rents. This income does not necessarily bear any relation to its reserve funds. Whereas its reserve funds on business transacted within the United States equal about 14 percent of all of its reserve funds, it may be that its income from interest, dividends, and rents from domestic sources far exceeds 14 percent of its total income therefrom, or it might be much less than 14 percent.

If it derived all of its taxable gross income from sources within the United States, but only paid a tax on 14 percent thereof, it would seem improbable that it has been taxed on a net income greater than its actual net income after deduction of its entire tax-exempt interest. If its actual taxable gross income from United States sources was $1,000,000, and it was required to return for taxation only 14 percent thereof, or $140,000, then $860,000 of its income which might have been subjected to the tax was not in fact subjected. Therefore, although only 14 percent of its tax-exempt interest be deducted from its theoretical gross income, the balance has not been subjected to the tax, unless it exceeds the amount of the gross income excluded from taxation. The exclusion from gross income of the $860,000 of taxable gross income would more than offset the unallowed deduction of a portion of the tax-exempt interest, amounting in this case to $4,250.00.

It may be the plaintiff did not derive all of its taxable income from sources within the United States, but how much it did derive, and whether or not that amount exceeds or is

Syllabus

less than its income determined in accordance with the statute, is not shown by the record. We are unable to say, therefore, whether or not plaintiff's net income which has been subjected to the tax is greater or less than its actual net income arrived at by deducting from its actual gross income its entire tax-exempt interest, and other deductions. If its net income subjected to the tax is less than its actual net income after deducting the entire tax-exempt interest, no tax has been levied on the tax-exempt interest, and therefore the contention pressed is not present.

In the case of *National Life Insurance Co.* v. *United States*, 277 U. S., 508, there was no question, under the opinion of the majority of the court, that the tax-exempt interest was in fact taxed. This has not been proven in this case.

It results that on the facts as shown the plaintiff is not entitled to recover, and its petition must therefore be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAMS, *Judge*, took no part in the decision of this case.

H. B. NELSON CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43574-A. Decided June 3, 1940. Plaintiff's motion for new trial overruled October 7, 1940]

On the Proofs

Government contract; misrepresentation; liquidated damages.—Where plaintiff, contractor, entered into a contract with the Government to construct radio towers in the Canal Zone, and where there were delays in completing the work due to failure on the part of the Government to make promptly certain inspections, for which delays the plaintiff was duly compensated, and where there were other delays due to certain changes in the contract for which plaintiff was duly compensated and the time limit was duly extended, and where there were still further delays for which liquidated damages were assessed, upon the facts shown it is held:

1. There was no misrepresentation on the part of the Government as to condition of the site nor any failure to disclose facts known to the Government.

2. Whatever changes were made, due to subsurface conditions, were carried out in strict conformity with the terms of the contract; a fair and reasonable compensation for the extra work was allowed, and a reasonable extension for the completion of the contract was made.

3. There is no showing that there was any duress or coercion brought to bear on the plaintiff to execute the release which plaintiff executed but said release was executed in due compliance with the terms of the contract.

4. Delays in completing the contract were caused by the plaintiff and the defendant was in no way responsible for any delays for which liquidated damages were assessed.

The Reporter's statement of the case:

Mr. S. Wallace Dempsey for the plaintiff. *Mr. Bruce Fuller* was on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Harry B. Nelson is an individual, trading as H. B. Nelson Construction Co., named as plaintiff herein.

2. Harry B. Nelson entered into a contract with the defendant June 19, 1934, numbered NOy–2203, whereby he agreed to furnish all labor and materials, and perform all work required for constructing concrete foundations for three 300-foot and six 600-foot radio towers, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated specifications and drawings, for the consideration of $47,816.00, the work to be commenced within ten calendar days after date of receipt of notice to proceed, the foundations for the 300-foot towers to be completed within 45 calendar days and the foundations for the 600-foot towers within 75 calendar days from the date of receipt of notice to proceed. A copy of the contract and specifications is in evidence and is made part of these findings by reference.

The officer contracting for the Government was the Chief of the Bureau of Yards & Docks, Navy Department.

Notice to proceed with the work was received by the contractor July 24, 1934. The date for completion of the foundations for the 300-foot towers was thereby fixed as on or before September 7, 1934, and for completion of the foundations for the 600-foot towers October 7, 1934.

The foundations for the 300-foot towers were completed within the agreed time.

3. Prior to inviting bids, the Public Works Officer of the Fifteenth Naval District at Balboa, Canal Zone, in which district was located the site here particularly involved, made a survey of the site and in so doing made probings with a pointed rod to determine the nature of the subsoil controlling the need of piles and their length, and made a log of these probings.

Bids were invited May 14, 1934, on the contract specifications.

Section 2-01 of the specifications provided:

> Bids shall be based on the following: (a) that the surface elevations are as indicated; (b) that rock will not be encountered; and (c) that no artificial obstructions will be encountered. In case the actual conditions differ from those stated and/or shown, an adjustment in the contract price and/or the time for completion of the work will be made in the same manner as provided by article 4 of the contract. Rock shall be defined as solid ledge requiring blasting for economical removal and/or boulders more than one-half cubic yard in volume.

Article 4 of the contract provided that:

> Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

And article 3 provided:

> Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Section 3–04 of the Specifications provided as follows:

> Bids shall be based on lengths of piles from point to cut-off as indicated. If precast piles are used the vertical reinforcement shall extend at least 2 feet above cut-off. Should longer piles or a greater number of piles be required, adjustment in payment under the contract will be made in accordance with article 3 of the contract. Except where cast-in-place piles are used, no deduction in payment under the contract will be made by reason of the actual length of pile in place being less than the length specified.

Section 4–06 of the specifications read as follows:

> Copies of the Government standard specifications mentioned, the General Provisions, Government Form of Contract (No. P. W. A. 51), and Bulletin No. 51 of the Federal Emergency Administration of Public Works, and any other information required may be had on application to the Chief of the Bureau of Yards and Docks or to the Commandant, Fifteenth Naval District, Balboa, C. Z.

Paragraph 7 of the General Provisions of the specifications read as follows:

> Information respecting the site given in the drawings and specifications has been obtained by the Government representatives and is believed to be reasonably correct, but the Government does not warrant either its completeness or accuracy. Intending bidders are invited to examine the site and acquaint themselves with the working conditions. They will be furnished with such additional information as is available by the local Government representatives.

4. The project is located alongside the Panama Canal, the nearest tower about 2,200 feet from the Culebra Cut.

The contractor's representative made an examination of the site of the work in May of 1934 before the contractor entered his bid. This examination was made with other prospective bidders present and under the leadership of the

Public Works Officer. The party proceeded to the site of each tower and viewed the existing conditions. It had rained the night before and the ground was wet, water standing in depressions.

The site of the 300-foot towers was on well-drained ground.

The 600-foot towers were to be six in number and were numbered serially 1, 2, 3, 4, 5, 6. Each tower had three footings, designated A, B and C.

The site of tower No. 1 was on high well-drained ground that had been filled many years before from excavation of the Panama Canal.

The site of tower No. 2 was on a gently sloping hillside, well-drained, with virgin soil.

The site of footing A of tower 3 was in a marsh, of footing B covered with a few inches of water, and of footing C on the edge of the fill which extended from tower No. 1. Otherwise the site of tower No. 3 was on virgin soil.

The site for tower No. 4 was very soft and marshy, on virgin soil.

The site for tower No. 5 was on virgin soil, on gently sloping ground at the edge of the marsh.

The site for tower No. 6 was on virgin soil, in a marsh covered with several inches of water.

All of the sites had growing on them high grass, 6 to 8 feet high and sufficient access thereto for inspection was made possible by a trail cut through the grass by a native using a machete. The party did not venture on marshy ground.

There were drainage ditches in the general area in which the towers were to be located, but their effect on the subsoil was not apparent.

The contractor based his bid on the inspection thus made by his representative, and being the low bidder was awarded the contract. He made no application to defendant's officers for further information. Defendant's officers made no representation to the contractor or his representative that the site was otherwise than it appeared to be and concealed no material fact from either of them.

5. The rainy season at the site of the project starts in May and ends in December.

Excavation at tower No. 2 started July 30, 1934, and the contract work on the foundations for that tower was completed September 19, 1934.

Before work was completed at tower No. 2 operations started at tower No. 1, and the foundation work there was completed October 2, 1934.

Concurrently with the work at tower No. 1 the contractor was working at tower-site No. 6. Excavation there was interrupted August 15, 1934, due to buckling of the sheet piling driven around the site. The buckling was caused by pressure of the soil inwardly. This could have been avoided by a more efficient form of cofferdam and the use of shoring. The cofferdam had to be and was reconstructed. The foundation work at tower site No. 6 was completed October 19, 1934.

The foundation work on tower site No. 3 was completed January 5, 1935.

While the contractor was excavating at tower site No. 4 his shovel slid off its mat into the mud. Attempts were made to pull it out of the mire with a tractor, without success. The shovel was finally recovered by pulling it out with another shovel. This delayed the progress of the work. The foundation work on tower site No. 4 was completed November 28, 1934.

The foundation work on tower site No. 5 was completed February 13, 1935.

There was a delay on the part of the Government in inspection of copper wire for tower foundations, resulting in delay in the placing of tower foundation No. 2, footing B. For this delay the contracting officer October 1, 1934, extended the time for completion of the foundation delayed, 10 days.

The contracting officer authorized the contractor to provide and place 720 one-inch dowels in pile foundations, and a soil-bearing test on the foundation of footing C of tower No. 1, and gave the contractor an increase of $470.88 in contract price and modified the contract in writing October 16, 1934, accordingly. A copy of the contracting officer's order is filed in evidence and made part hereof by reference.

Longer piling than that estimated by the Government was found necessary at the locations for towers 3, 5, and 6.

The contractor also encountered rock in excavating for the foundations for tower No. 4 and the contractor was required to provide a drainage ditch to protect footing C of foundations for tower 3.

The contracting officer determined that there should be added to the contract price for the extra length in piling, for the rock excavation and for the drainage ditch the total sum of $4,784.54, with an extension of 35 days for the completion of the contract, and the contract was modified in writing accordingly March 25, 1935. A copy of the contracting officer's order is filed in evidence and made part hereof by reference.

6. The contractor consumed more time in prosecution of the work than that estimated by him and allowed by the contract, due to various causes, among which were the wet, marshy condition of subsoil, the buckling of sheet piling (as heretofore set out), lack of equipment adequate for the conditions actually encountered, breakdowns in equipment, the miring of excavating or pile-driving equipment, lack of drainage, failure to prosecute the work more vigorously, and the changes authorized by the Government and its failure to inspect copper wire promptly. The delays experienced threw the work into the dry-weather period, during which time the work could be done faster than during the rainy season.

7. For all delays occasioned by the Government there has been given the contractor adequate extension of time for performance, together with fair and reasonable compensation.

8. The contract price as modified by change orders was $53,071.42. Of that amount the defendant has paid the contractor $49,121.42, and assessed against him by way of liquidated damages, under article 9 of the contract and section 1–06 of the specifications, the difference of $3,950.00, computed as follows:

Tower No. 3	55 days at $25	$1,375.00
Tower No. 4	12 " " "	300.00
Tower No. 5	91 " " "	2,275.00
		3,950.00

9. April 12, 1935, the contractor executed a release under article 16 (d) of the contract, to the Government, of "all claims arising under or by virtue of said contract" except "the right to protest the liquidated damages amounting to $3,950.00."

April 15, 1935, the contractor applied to the contracting officer for remission of liquidated damages, which the contracting officer refused May 1, 1935, finding an absence of misrepresentation as to conditions at the site, and that conditions actually encountered were not different from what might reasonably have been expected.

From this refusal the contractor appealed to the Secretary of the Navy July 3, 1935. The Secretary entertained the appeal and on October 15, 1935, sustained the action of the contracting officer.

There is no proof that the decision of the Secretary of the Navy, on appeal, was mistaken in matters of fact.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant on June 19, 1934, whereby it agreed to furnish all labor and materials and perform all work required for the construction of concrete foundations for 300-foot and 600-foot radio towers at the Naval Radio Station, Summit Canal Zone, in accordance with designated specifications and drawings, for the sum of $47,816.00. The work was to commence 10 days after receipt of notice and the foundations for the 300-foot towers were to be completed within 45 days and the foundations for the 600-foot towers within 75 days from the date of receipt of notice to proceed.

The plaintiff was notified to proceed with the work July 24, 1934 and this fixed the date for completion of the 300-foot towers as on or before September 7, 1934, and for the 600-foot towers October 7, 1934. The foundations for the 300-foot towers are not in controversy as they were completed within the time specified.

During the course of the work plaintiff was delayed by the Government by failure to inspect the copper wire for the tower foundations on time and the contracting officer extended the time for completion 10 days. The contracting officer also authorized certain changes in the tower foundations and soil-bearing test on the foundations of footing C of tower No. 1, and gave an increase of $470.88 in the contract price and modified the contract in writing accordingly. Longer piles were required at three of the locations for the towers and rock was encountered in the excavations of the foundations for one of the towers and the contractor was required to provide a drainage ditch to protect footing C of foundations for another tower. For the extra length of piles, for the drainage ditch, and for the rock excavations, the contracting officer determined that the contract price should be increased by $4,784.54 and gave an extension of 35 days for the completion of the contract. All of these changes were in accordance with the terms of the contract and the specifications.

Section 2–01 of the specifications provided:

> Bids shall be based on the following: (a) that the surface elevations are as indicated; (b) that rock will not be encountered; and (c) that no artificial obstructions will be encountered. In case the actual conditions differ from those stated and/or shown, an adjustment in the contract price and/or the time for completion of the work will be made in the same manner as provided by article 4 of the contract. Rock shall be defined as solid ledge requiring blasting for economical removal and/or boulders more than one-half cubic yard in volume.

Article 4 of the contract provided:

> *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifica-

tions, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

Section 3-04 of the Specifications provided as follows:

Bids shall be based on lengths of piles from point to cut-off as indicated. If precast piles are used the vertical reinforcement shall extend at least 2 feet above cut-off. Should longer piles or a greater number of piles be required, adjustment in payment under the contract will be made in accordance with article 3 of the contract. Except where cast-in-place piles are used, no deduction in payment under the contract will be made by reason of the actual length of pile in place being less than the length specified.

The work was completed and accepted on April 12, 1935, the contracting officer having assessed against the plaintiff $3,950.00 for 55 days' delay on tower No. 3, 12 days on tower No. 4, and 91 days on tower No. 5. When the work was completed and accepted, the plaintiff executed a release with the Government for all claims arising under or by virtue of the contract in accordance with Article 16 (d) of the contract and reserved only the right to protest the liquidated damages which had been assessed.

Article 16(d) of the contract reads as follows:

Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

The plaintiff brings this action to recover damages for delays and added expense caused by (1) misrepresentation and failure to disclose facts as to the site where certain radio tower foundations were to be constructed necessitating

changes due to unforeseen soil conditions and (2) through breach of the construction contract.

In the advertisement for bids and paragraph 7 of the General Provisions of the Specifications, the plaintiff was informed as follows:

> Information respecting the site given in the drawings and specifications has been obtained by Government representatives and is believed to be reasonably correct, but the Government does not warrant either its completeness or accuracy. Intending bidders are invited to examine the site and acquaint themselves with the working conditions. They will be furnished with such additional information as is available by the local Government representatives.

The plaintiff was informed by this provision that it was encumbent upon it to make its own examination of the site and that only the information which was in possession of the Government would be given and that this information was not guaranteed. Plaintiff made its own examination of the site along with other bidders and had full opportunity to become acquainted with all the conditions. No information in the possession of the Government was withheld from the contractor who did not seek during the execution of the contract any further information from the defendant but relied entirely upon its own inspection.

The Commissioner has found and, after a thorough investigation of the record, we are convinced that there was no misrepresentation as to the condition of the site and that the Government furnished the plaintiff with all the information in its possession which had any bearing on the contract. Whatever changes were made, due to sub-surface conditions, were carried out in strict conformity with the terms of the contract, a fair and reasonable compensation for the extra work was allowed, and a reasonable extension for the completion of the contract was made. The evidence shows that plaintiff was a member of the Boards which passed on these changes and agreed that they were satisfactory both as to amounts and to extension of time. Besides, plaintiff executed a release and only excepted to the amount of liquidated damages which had been assessed against it.

There is no showing that there was any duress or coercion brought to bear on the plaintiff to execute this release but it was executed in due compliance with the terms of the contract as above set forth. This release is binding on the plaintiff. *Chamberlain Machine Works* v. *United States*, 59 C. Cls. 972; 270 U. S. 347; *Siff Brothers Co.* v. *United States*, 60 C. Cls. 331; *Eppes* v. *United States*, 62 C. Cls. 645; and *DeRonde & Co.* v. *United States*, 63 C. Cls. 665.

In *Hartsville Oil Mill Company* v. *The United States*, 60 C. Cls. 712, 725, (affirmed 271 U. S. 43), the court held:

> * * * In bald terms the plaintiff takes the position that it can take the benefit of the settlement contract, repudiate it, and demand its rights under the original contract and have them enforced. Such a position is not tenable.
>
> * * * If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement.

The sole question remaining in our judgment is the assessment of liquidated damages for delays in completing the contract on time. There is no question that three of the towers were not completed until long after the time provided for the completion of the contract, as extended by the change orders and that the liquidated damages are assessable unless the delays were occasioned by the defendant.

The record fails to disclose that there are any misrepresentations on the part of the defendant as to the conditions to be encountered at the site or any sub-surface conditions or delays for which the plaintiff was not fully compensated and a reasonable extension of time for the completion of the contract granted. A careful perusal of the evidence shows that the terms of this contract were faithfully and carefully preserved and every step taken by the Government was in compliance with the terms of the contract. *Griffiths* v. *United States*, 74 C. Cls. 245. The delays which were not compensated for were those arising from the failure of the plaintiff to expedite the work by having adequate equipment and a vigorous prosecution of the work by an adequate crew of workmen.

The facts show that the delays were caused by the plaintiff and the defendant was in no way responsible for any delays for which liquidated damages have been assessed.

There can be no recovery on the part of the plaintiff and its petition is dismissed. It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

H. B. NELSON CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 43574–B. Decided June 3, 1940. Plaintiff's motion for new trial overruled October 7, 1940]

On the Proofs

Government contract; delays; liquidated damages.—Where plaintiff, contractor, entered into a contract with the Government to erect certain structures at the Naval Radio Station, Canal Zone, it is held that the facts show the Government complied strictly with the terms of the contract and plaintiff was not delayed by any act of the Government for which plaintiff was not allowed an extension of time and an increase in the contract price, and consequently plaintiff is not entitled to recover for the liquidated damages properly assessed under the contract.

The Reporter's statement of the case:

Mr. S. Wallace Dempsey for the plaintiff. *Mr. Bruce Fuller* was on the briefs.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant.

The court made special findings of fact as follows:

1. Harry B. Nelson is an individual, trading under the name of H. B. Nelson Construction Co., named as plaintiff herein.

2. On the 12th of September 1934, Harry B. Nelson entered into a contract with the United States, numbered NOy–2248, whereby, for the consideration of $275,889.00, he agreed to furnish all labor and materials, and perform all

work required for constructing an intermediate and high frequency transmitter building, a low frequency transmitter building, a barracks, a helix house, a pump house, a water tower, two cooling ponds, a settling tank, certain roads and walks, and water, sewerage, drainage and electrical systems, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated drawings and specifications, the work to be commenced within 10 calendar days after date of receipt of notice to proceed, the buildings and services to be completed within 300 calendar days and all the remaining work within 330 calendar days from the date of receipt of notice to proceed.

Notice to proceed with the work was received by the contractor September 26, 1934, thus fixing the final date for completion of the buildings and services July 23, 1935, and of the remaining work August 22, 1935.

The Chief of the Bureau of Yards & Docks, Navy Department, was the contracting officer for the United States.

Copies of the contract and specifications are filed in the case and made part hereof by reference.

Liquidated damages in favor of the Government for delay not excusable under the terms of the contract were fixed by Section 1–06 of the specifications at the following rates per day:

(a) Low frequency building with all connecting services	$15.00
(b) High frequency building with all connecting services	15.00
(c) Helix house with all connecting services	15.00
(d) Barracks with all connecting services	15.00
(e) Facilities building with all connecting services	10.00
(f) Quarters for officer in charge with all connecting services	5.00
(g) Quarters for executive officer with all connecting services	5.00
(h) Each quarters for chief petty officers with all connecting services	5.00
(i) Other structures, roads, and the remainder of the work	30.00

3. In preparation for performance the contractor entered into various contracts with suppliers of materials in the United States.

The contract in suit required the furnishing and installation of screens in the steel pivoted windows of the high and low frequency buildings. The contractor procured

these screens in the United States and they were passed by the defendant's inspectors before shipment to the site of the work. The inspector at the site rejected them in their then condition and in order to pass local inspection the contractor materially altered them.

Section 15–04 of the specifications provided that each screen unit should include "a positive contact roll, at top or bottom of the unit, as the case requires", and concluded:

> Screens shall suit the type of the steel windows for which they are used, and the contractor shall remove all existing hardware where necessary for the proper installation of the screens; hardware removed shall be replaced by hardware of the kind required for complete and satisfactory operation of the screened windows.

The work that plaintiff did on the screens was necessary in order to make them conform to the specifications, and the fitting of the screen to its window was a hand-fitting job that could only be performed at the site.

4. The General Provisions forming part of the contract provided in Section 13 for the routine to be followed in order to secure required factory inspection of materials. It was provided:

> He [the contractor] shall furnish four copies of orders for all such materials, as soon as placed either to the bureau or to the officer in charge, as previously directed. These orders shall be complete as to the quantities, qualities, dimensions, sizes, capacities, types, etc., and with proper references to applicable Government specifications by title, number, and paragraph. They shall show the actual factory name and street address. They will not be required to contain prices or contractual terms. When an order has been assigned to an inspection office, any further suborders in connection therewith shall be furnished to the inspector direct, and not to the bureau or the officer in charge. If orders provide for material apparently not in accordance with the contract, the contractor should be so notified.

The Bureau of Yards & Docks received from the contractor July 13, 1935, a communication stating that he was placing his order for glass and putty according to an estimate to which he referred, but did not furnish the order,

or copies of the order required by Section 13 of the General Provisions. The Bureau of Public Yards & Docks in order to supply this deficiency, instructed its inspection office in New York to secure the requisite copies from the Pittsburgh Plate Glass Co., who had the order, one copy to be forwarded to the bureau and another to the Public Works Officer. The inspector of Naval Materials in New York accordingly requested the copies of the Pittsburgh Plate Glass Co. July 17, 1935. The inspectors received the documents September 19, 1935 and the glass was inspected and released for shipment September 23, 1935. A sample of the putty was taken for analysis and test September 23, 1935, and was released for shipment October 2, 1935.

There was no delay on the part of the Government in inspection and release for shipment of the glass and putty to the site of the work.

5. Materials required to be furnished by the contractor included lavatories.

The lavatories came from the Tiffin Works of Standard Sanitary Manufacturing Co. on order of Horne-Wilson, Inc., of Atlanta, Ga. The manufacturer notified the Inspector of Naval Material at Cleveland, Ohio, June 5, 1935, that the material was ready for inspection at the Tiffin Works and June 17, 1935, Horne-Wilson, Inc., among other matters advised the manufacturer that its "customer" desired certain changes in the order for lavatories, and instructed the manufacturer to effect the changes.

On the 26th of June, 1935, the Bureau of Yards & Docks informed the inspector of Naval Material at Cincinnati, Ohio, that the material to be shipped from Tiffin, Ohio, was to be inspected by the inspector of Naval material located at Munhall, Pa. The Chief Inspector of the Bureau of Yards & Docks July 1, 1935, called upon Horne-Wilson, Inc. to reconcile copies of orders they had sent to the bureau with copies they had sent to the manufacturer, and this request was followed up July 16, 1935. The reconciliation was furnished the chief inspector by Horne-Wilson, Inc., July 20, 1935, and this information was forwarded by the Bureau of Yards & Docks to the inspectors at Cincinnati and Munhall July 23, 1935. The change made from the original order for the lavatories was from wall-mounted to

floor-mounted traps. Not having the change in specifications made by the plumber having the installation, the Government inspector had rejected the lavatories because they had floor-mounted traps. Horne-Wilson, Inc., was by letter from the Chief Inspector of the Bureau of Yards & Docks August 6, 1935, specially informed of this rejection. On September 14, 1935, Horne-Wilson, Inc., by letter advised the Chief inspector of the change from wall-mounted to floor-mounted traps, and requested prompt inspection and release for shipment. On September 27, 1935, the manufacturer informed the inspector that the lavatories were ready for inspection.

On or about September 30, 1935, they were again inspected and released for shipment, and on that date were by the manufacturer shipped to the job.

They were received on the job about the first of November 1935, and thereafter installed in the barracks building, the low frequency building and the high frequency building without delaying the completion of those buildings.

There was no delay on the part of the Government in inspection of the lavatories.

6. During the course of the contract work a controversy arose between the parties as to the number of cover plates of floor trenches used for housing electric cables, the contractor maintaining that certain plates were outside of contract requirements, the Government maintaining that they were required by the terms of the contract. They were furnished and installed by the contractor. There is no proof that the Government's requirement was arbitrary or unreasonable.

7. Section 8–01 of the specifications in part provided:

> The ceiling in the helix house shall conform to the applicable requirements of paragraph 1–27 of the standard specification No. 7Yg, except that the metal covering will be required on the underside only and except that the metal covering shall be copper weighing not less than 14 ounces per square foot; all fastenings shall, as far as practicable, be of bronze, copper, or brass.

The original specifications called for the ceiling in the helix house to be covered with copper sheeting, in sections of about 4 by 12 feet. The purpose of the copper ceiling

was to shield the steel in trusses and roof reinforcing from high frequency radio currents, and metallic joining together of the copper sheets was necessary in order to secure an uninterrupted electrical path. At the joints were to be placed strips of copper 4½ inches wide to be fastened thereto by the sweating process. In the sweating process cold solder was placed between strip and sheeting, heat applied thereto until the solder melted and formed a bond. This method was tried out by the contractor with the result that the heat caused the sheeting to buckle and on cooling contract to such an extent that the bond was broken. This was unsatisfactory. The contractor took the sheets down and tried the sweating process again with bolts at every 12 inches on center. The same trouble was experienced. With the concurrence of defendant's officers two bolts were then used at every 12 inches on center, without sweating, and the work was accepted.

In making his estimate of the cost of this work the contractor contemplated using the sweating process.

The use of bolts without sweating cost less than sweating the strips to the sheeting. No change order to cover the decrease in cost was issued and the contractor has been paid on the basis of the sweating process.

Proof that the sweating process was impracticable is not satisfactory.

8. A part of the contract work was the construction of roads within the station area. Section 3–03 of the specifications in part provided, in connection with road work:

> The subgrades shall be compacted by rolling with a power roller weighing not less than 350 pounds per lineal inch of tire width.

The contractor used a roller of less than the agreed weight and had difficulty in effecting an even surface, the road in front of the roller in places curling up and the roller forcing into the ground more stone than he had calculated on laying down, so that he had to replenish his supply of stone.

The work was eventually accomplished with the roller provided by the contractor. There is no proof that the contractor was required to do more than provided for by his contract.

9. The specifications provided for pressure and operating tests of the water pumps and filtration equipment in Section 24–11 as follows:

> Before painting, the water piping shall be tested under a hydrostatic pressure of 150 pounds per square inch and proved tight. After the completion of the installation and the pipe tests, operating tests of the equipment shall be made as necessary to determine compliance with the contract requirements. All defects disclosed by the tests shall be corrected by and at the expense of the contractor. The Government will furnish electricity for tests. The contractor shall provide all equipment necessary for the tests.

The electricity was necessary for running the motors that actuated the pump for the elevated water tank. The contractor was ready to make the test in the latter part of October, 1935. The Government did not have electricity available before completion of the contract work.

By reason of its inability to furnish electricity the Government accepted the plant without the test.

The extent to which the contractor was damaged by reason of failure on the part of the defendant to furnish electrical power is not satisfactorily proved.

10. The contracting officer issued Change Order A May 8, 1935, increasing the contract price by $10,905.72, and the time for completion by 60 calendar days, owing to the following changes in the work:

> (a) Relocate the High and Intermediate Frequency, the Low Frequency and Helix Buildings, with their respective roads and services in accordance with plans furnished; change the details of construction in the Helix House as shown on revised drawings; change interior and exterior details of the Low Frequency Building as shown or directed; provide additional windows and conduit connections at the High and Intermediate Frequency Building as shown; omit three transformers and provide four laundry tubs in lieu of a scrub deck, as shown at the Barracks Building; and
>
> (b) Provide non-ferrous concrete aggregates for the coil and variometer foundations in the Helix and Low Frequency Buildings; provide and install additional ground busses and pipes and three antenna eyes with

anchors as shown and instructed; and complete the road connection at the main station entrance as instructed; All as directed by the officer in charge.

Again, on July 27, 1935, the contracting officer further increased the contract price by $3,204.28, and extended the time for completion by 5 calendar days to cover the following changes:

(a) Provide structural steel supports in the roof trusses of the Helix House for the changed location of the antenna eyes;

(b) Provide ducts for the parkway lighting cable under future roads as directed;

(c) Provide a 50 pair telephone cable in lieu of the 5 pair necessary and omit the installation on same;

(d) Provide concrete trenches for transformer connections as shown in lieu of steel conduit as planned at the High Frequency Building, and install a duct for electrical connection to the cooling pond motor; and

(e) Provide additional trenches and make changes in others called for in the Low Frequency Building floor;

All as directed by the officer in charge.

On the 7th of October, 1935, the contracting officer issued the following order:

The contracting officer finds that owing to delay by the Government in the inspection of roofing material for the buildings the progress of the work under Contract NOy–2248 was delayed ten days, and extends the time for the completion of the contract work ten days accordingly.

The High and Low Frequency Buildings were completed November 11, 1935; the Helix House November 8, 1935; the Barracks Building December 2, 1935, and the remaining work November 7, 1935.

The contractor executed the following release December 12, 1935:

Pursuant to provisions of Contract NOy–2248, dated 12 Sept. 1934 by and between The United States (the Government) and H. B. Nelson Construction Company (the contractor) for Buildings, Roads and Services, U. S. Naval Radio Station, Summit, Canal Zone and in consideration of the payment by the Government of the

> total sum of Two Hundred Eighty-seven Thousand Eight Hundred Forty-two and 71/100 dollars ($287,-842.71), the receipt of which is acknowledged, the contractor does hereby release the Government from all claims arising under or by virtue of said contract. Except that the contractor reserves the right to protest the assessment of twenty-four hundred and ninety dollars ($2,490.00) for liquidated damages.

On or about September 29, 1936, the contractor was allowed and paid through a settlement stated by the General Accounting Office the sum of $720.00, purporting to adjust the deduction for liquidated damages to $2,490.00.

12. With respect to matters of fact in the performance of the contract the contracting officer made the following findings, communicating them to the contractor on or about the dates indicated:

On February 7, 1936.

> Reference is made to your letter of 13 January with regard to certain delays in connection with Contract NOy-2248.
>
> With regard to the electrical tests, it does not appear that the two days' delay to which you refer was due to a cause that could be considered excusable under Article 9 of the contract.
>
> With respect to your order for glass, it appears that on 15 July, on receipt of notice of the placing of your order of 10 July with a manufacturer, this Bureau communicated with the Inspector of Naval Material at New York with suggestion that detailed copies of the purchase order be obtained from the manufacturer; that the Inspector, 17 July, requested them of the manufacturer; that on 19 September a detailed list of glass and putty required for this contract was received by the Inspector; that the glass was inspected and released for shipment, and that the putty, after laboratory test, was released for shipment 2 October 1935. From this it appears that no more than a reasonable time was taken by the Government in conducting the inspections.
>
> The Inspector of Naval Material at New York received on 4 October a detailed list of glass and putty required for the parachute building at France Field for which it is understood you had the contract with the War Department. This list was apparently submitted owing to erroneous or misunderstood instruc-

tions from you to the manufacturer. The order was transmitted 16 October to the Inspector of Naval Material at Munhall, Pa. It had, however, no connection with the Navy contract, and the inspection office at Munhall reports that no inspection of the material has been made and that no request for inspection has been received from the manufacturer. The transfer of the order to the Munhall office in no way delayed the inspection of the material for Contract NOy–2248.

In the circumstances, the matters to which your letter of 13 January relates are not regarded as justifying a time extension under the contract.

On March 19, 1936.

Consideration has been given to your letters of 20 and 25 February, in which you ask a time extension under Contract NOy–2248 on the ground of delay by the Government in the inspection of plumbing fixtures.

It appears from a report by the Inspector of Naval Material, Pittsburgh District, that the plumbing fixtures were first submitted for inspection 19 July, 1935, on which date inspection was made and shipment of water closets, urinals, and sinks was authorized; that the lavatories were rejected owing to a question as to the trap to be used, and that this question was settled 25 September, on which date shipment of the lavatories was authorized; shipment of the entire order being made 30 September. While the lavatories were held up because of the disagreement as to the type of trap mounting required, there appears to be no reason why the remainder of the fixtures could not have been shipped when approved 19 July.

The lavatories were, it is understood, accepted as first submitted. Information was accordingly requested of the Fifteenth Naval District as to the effect the delay from 19 July to 25 September in the approval of the lavatories in itself had on the time of completion of the several buildings. The Commandant advises the Bureau as follows:

The plumbing supplies referred to by the contractor in the basic letter were received 1 November 1935. A brief resume of the various factors, other than the delay in arrival of certain plumbing fixtures, fixing the date of completion of each of the various buildings follows:

Barracks Building:

Completed 2 December 1935. The vitreous tile for the toilets did not arrive until 16 November and in-

stallation was not completed until 2 December 1935. Further, the water heater and tank for the kitchen were not received until 25 November and were not installed until 29 November 1935.

Helix House:

Completed 8 November 1935. No plumbing fixtures are installed in this building.

Low Frequency Building:

Completed 11 November 1935. Screens for steel pivoted windows as delivered were not accepted in that "an efficient positive contact roll" as required under article 15-04 of specifications #7515 was not provided. The screens were not satisfactorily installed until 11 November 1935. Glazing in this building was not finished until 4 November 1935. All required cover plates for the trenches were not provided until 7 November 1935.

High Frequency Building:

Completed 11 November 1935. Screens for steel pivoted windows as delivered were not acceptable in that "an efficient positive contact roll" as required under article 15-04 of specifications #7515 was not provided. The screens were not satisfactorily installed until 11 November 1935. Glazing in this building was not finished until 4 November 1935.

From the foregoing it is evident that the dates of completion of the several buildings could not have been materially affected by the date of delivery of the plumbing supplies referred to in the basic letter.

In view of the facts reported by the Commandant a finding by the Bureau of delay in the completion of the work by reason of the nonapproval of the lavatories when first submitted for inspection would not appear to be warranted.

On May 19, 1936.

The Bureau has received your letter of 26 March, and regrets that its decisions with respect to time extensions seem to you to be inequitable. Its action in these matters is, however, based on reports from inspection offices and the Fifteenth Naval District, which appear to support the conclusions reached.

The Bureau does not feel that under the terms of the contract further action on its part in the matter of the basis of settlement is in order.

There is no evidence of appeal to the Secretary of the Navy.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff entered into a contract with the defendant on September 12, 1934, whereby in consideration of $275,889.00, it agreed to furnish all labor and materials and perform all work required for the construction of an intermediate and high frequency transmitter building, a low frequency transmitter building, a barracks, a helix house, a pump house, a water tower, two cooling ponds, a settling tank, certain roads and walks, and water, sewerage, drainage and electrical systems, at the Naval Radio Station, Summit, Canal Zone, in accordance with designated drawings and specifications, the work to be commenced within 10 calendar days after date of notice to proceed, the buildings and service to be completed within 300 calendar days and all the remaining work within 330 calendar days from the date of receipt of notice to proceed.

Plaintiff was notified to proceed with the work on September 26, 1934, thereby fixing the final date for completion of the buildings and services on July 23, 1935, and the remaining work August 22, 1935.

During the course of the contract certain changes were made from time to time as provided in the contract. Change orders were issued and the plaintiff was a member of the Board which agreed on these changes and additional compensation and extensions of time to be granted.

The contract was finally completed on December 2, 1935, and liquidated damages were assessed against the contractor in the sum of $2,490.00.

Upon the completion and acceptance of the work, the contractor executed a release on December 12, 1935, in conformity with the provisions of the contract, releasing the Government from all claims arising under or by virtue of the contract and reserved only the right to contest the amount of liquidated damages assessed.

Plaintiff brings this action to recover expenditures made over and above the contract price, alleging against the de-

fendant numerous and frequent changes in construction and plans, delaying the time of completion and increasing the cost.

The facts show that all these changes which were made were provided for in the contract, and that plaintiff accepted the Change Orders, performed the work, received the compensation as fixed in the Change Orders and that the time for completion of the contract was extended by the allowance of additional days. In addition to this, plaintiff's release to defendant of all claims is a complete defense to any action for recovery under the contract except as to the items which had been specifically excepted in the release. *Nelson Construction Company*, No. 43574–A, decided this date, *ante*, p. 476.

The plaintiff claims that the delays for which liquidated damages were assessed were occasioned by the defendant in failing to have prompt inspection made of the glass and putty. The evidence discloses that inspection was made within a reasonable time and, if there were any delays, plaintiff contributed to them by its failure to give the proper information to the manufacturer from whom the glass and putty had been purchased by it.

It is also contended that the Government delayed plaintiff in not properly inspecting the plumbing fixtures but the facts show that the completion of the buildings was not delayed because of a slight delay in inspection.

Plaintiff also contends that it was not required under the contract to make the screens tightly fit the window frames because the screens had been inspected and accepted in the United States and that this requirement entailed extra labor and retarded the completion date of the contract. The specifications provided as follows:

> Screens shall suit the type of the steel windows for which they are used, and the contractor shall remove all existing hardware where necessary for the proper installation of the screens; hardware removed shall be replaced by hardware of the kind required for complete and satisfactory operation of the screen windows.

The inspection in the United States was purely one of materials. The contract required that the screens should fit

the windows in such a way as to prevent insects from entering the building but after the arrival of the screens it was found that certain adjustments had to be made in order to make them bug-proof. It was part of the contract that plaintiff should perform this work. We can find no variance from the specifications in requiring plaintiff to fit the screens to the windows.

There are other allegations of delay on the part of the Government in reference to road-building and furnishing electricity, and the covering of the ceiling of the helix house with copper sheeting, which we do not think it necessary to discuss at length.

The facts in the case show that the Government complied strictly with the terms of the contract and that plaintiff was not delayed by any act of the Government for which it was not allowed an extension of time and an increase in the contract price.

The delays for which plaintiff has had liquidated damages assessed against it were caused by its own failure to comply with the terms of the contract.

Plaintiff's petition is dismissed. It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JOHN B. HOLMBERG v. THE UNITED STATES

[No. 43612. Decided June 3, 1940. Defendant's motion for new trial overruled October 7, 1940]

On the Proofs

Government contract; date of award.—Where plaintiff on September 4, 1935, submitted a bid to the Soil Conservation Service of the Department of Agriculture to make certain aerial photographs, and on September 20, 1935, a telegram was sent to plaintiff stating that his offer was accepted and that a formal contract and performance bond would be sent him for execution and return for completion by the Department, but that said telegram was "your authority to proceed with work immediately"; and where plaintiff received from defendant a formal contract

which plaintiff signed on October 18, 1935, and returned to the department on October 21, 1935; and where said contract was signed by defendant on November 5, 1935, and returned to plaintiff on November 26, 1935, the plaintiff meantime having proceeded with the work and incurred certain expenses incident to the work prior to the receipt of the signed contract, it is held that the date of November 26, 1935, on which said signed contract was received by plaintiff, was the date of award, from which liquidated damages, if any, were to be assessed in accordance with the provisions of the contract.

Same; prior agreement.—Where a prior agreement was superseded by a formal and final contract, all prior agreements are merged in the final contract between the parties.

The Reporter's statement of the case:

Mr. Errett G. Smith for the plaintiff.

Mr. E. A. Compton, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Henry Fischer* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff, John B. Holmberg, is an individual doing business as "Holmberg Air Mapping Company," with his place of business at Minneapolis, Minnesota.

2. On September 14, 1935, the Soil Conservation Service of the United States Department of Agriculture received a bid from plaintiff, in which he agreed to make certain aerial photographs in the States of North Dakota, Minnesota, Wisconsin, Iowa, and Illinois, for which he was to receive the sum of $2,856.37.[1]

3. On September 20, 1935, a telegram was sent to the plaintiff, which he received on September 21, 1935, reading as follows:

> REBID TWENTY-TWO NINETY-FIVE YOUR OFFER ACCEPTED GROUP EIGHT AT TWO THOUSAND EIGHT HUNDRED FIFTY-SIX DOLLARS AND THIRTY-SEVEN CENTS FORMAL CONTRACT AND PERFORMANCE BOND IN FULL AMOUNT OF ORDER NOW BEING PREPARED AND WILL BE SENT YOU FOR EXECUTION AND RETURN FOR FINAL COMPLETION BY THE DEPARTMENT STOP. THIS IS YOUR AUTHORITY TO PROCEED WITH WORK IMMEDIATELY.

[1] It is agreed by the parties that this amount which was also carried into the final and formal contract is $60 in excess of the total amount of the contract.

4. The invitation to bidders read, in part, as follows:

> The successful bidder will be required to have his plane at the airport within ten (10) calendar days after official notification to proceed with the work, or sooner if possible, and shall wire the Soil Conservation Service the day his plane arrives at the airport, from which flying will be done. Failure on the part of the contractor to meet this requirement will result in subtracting from payments due him, as liquidated damages, twenty ($20) dollars per calendar day for each day thereafter until his plane and photographic crew arrive at the airport.
>
> The contractor will be required to keep his plane stationed at said airport until the completion of flying. The contractor shall notify the Soil Conservation Service by wire the day flying of each item has been completed. If the Soil Conservation Service is not notified on the date flying is completed, it will be assumed that flying was completed in fourteen (14) calendar days after the date of award, and liquidated damages for failure to deliver required materials will be computed on this basis. In the event that the first delivery of prints or materials is rejected, for failure to meet the specifications, the contractor will be required to have a plane back at the airport, from which additional flying will be done, within five (5) calendar days after official notification of such rejections, except that, if any part of the area called for still remains unflown, the contractor shall continue to maintain his plane at the airport referred to until such time as all flying is completed.

5. September 28, 1935, Louis A. Woodward, Acting Chief Photogrammetrist, wired the plaintiff in effect that the presidential order required acceptance, before contract, of a provision in the Bituminous Coal Conservation Act of 1935 and that plaintiff should wire acceptance or rejection to him (Woodward).

September 30, 1935, the plaintiff wired Woodward that he accepted the provisions of the Coal Conservation Act and was ready to start flying as soon as a filter mounted in optical "A" glass arrived from the factory, which should be in two or three days.

October 10, 1935, plaintiff wrote a letter to Woodward stating, among other things, that he had received his wire

directing attention to Paragraph 14 of the specifications; that his plane and crew had been standing by at the Minneapolis Airport awaiting suitable weather since Tuesday, October 8; and that he assumed this would answer the requirements of telegraphic notice required by Paragraph 14. He further stated in the letter that he would like a ruling as to what "you consider the date of award for the purposes of paragraph 14 of the specifications"; that he had received a wire signed S. A. Snyder, Department of Agriculture, on September 21 advising that "our offer group 8.USDA2295 was accepted and to proceed with the work immediately. Later we received your wire of Sept. 28th, stating it was necessary to have our acceptance of the Coal Conservation Act before a contract could be awarded us. I accepted that by wire on Sept. 30th. To date we have not received a formal contract." Plaintiff further stated in substance that the work was proceeding as fast as the weather would permit and that some delay was caused by getting a proper filter mounted in optical "A" glass.

October 18, 1935, Woodward wrote the plaintiff acknowledging the receipt of his letter of October 10. This letter read in part as follows:

> This office has contacted Mr. F. A. Snyder, Department of Agriculture, in order to obtain a ruling as to the date of award of U. S. D. A. 2295. The date of award will be considered that of the day the formal contract has been signed. The telegram from Mr. Snyder of September 21 was to advise you that your offer of Group 8 under advertisement U. S. D. A. 2295 was accepted and that you might proceed with the work before bad weather set in. Thus liquidated damages cannot be assessed for not having a plane on the project until ten days after the formal contract has been signed.

6. The territory which plaintiff contracted to photograph from the air, and then provide defendant with the contact prints, index maps, enlargements, and negatives, embraced seven separate, specific areas lying in the States of North Dakota, Minnesota, Wisconsin, Iowa, and Illinois. The contract provided that plaintiff was to be paid a total of $2,796.37, and plaintiff submitted therefor seven separate vouchers demanding payment of the several items.

On October 18, 1935, plaintiff signed the contract with defendant, by the terms of which he agreed to furnish and deliver all labor and equipment for performing and he agreed to perform all work required for making aerial surveys of the demonstrated areas as set forth in "Group VIII" of the specifications accompanying and which were a part of the contract. This contract, together with the accompanying specifications, is attached to the petition as plaintiff's exhibit "A" and is by reference hereby made a part of this finding.

After signing the contract on October 18, 1935, plaintiff returned it to the Department of Agriculture on October 21, 1935. It was signed by defendant on November 5, 1935, and returned to plaintiff on November 26, 1935. However, prior to the formal complete signing of the contract, plaintiff had gone ahead and incurred certain expenses incident to the completion of the contract.

7. The specifications read in part as follows:

> As soon as possible after photographs are received at Washington, they will be inspected and the contractor notified immediately whether or not they are satisfactory and what area, if any, must be rephotographed. Because of urgent need for the material called for under this advertisement, contractors will be required to make complete delivery of all initial materials submitted to the Department for acceptance, although such materials may be rejected because of failure to meet specifications. This means that if the Department is notified that flying is completed and partial deliveries are made and rejected, the contractor will be required to furnish the Department with all of the materials called for in this advertisement although unsatisfactory, and will, in addition, be required to refly the area and to furnish an additional complete set of materials which meet the specifications. All contact prints, index maps, enlargements, and negatives of each item must be delivered to the Soil Conservation Service within fourteen (14) calendar days after the date flying is completed. If the contractor fails to deliver all materials in the above-required time, it will result in subtracting from payments due him, as liquidated damages, twenty ($20) dollars per calendar day for each day thereafter, until the contract is completed.

8. On October 8, 1935, plaintiff had his plane first available at the airport. This was due to plaintiff's inability to get a proper filter mounted in optical "A" glass, being a part of his camera equipment. Plaintiff was charged with liquidated damages for 7 days at the stipulated rate of $20 per day, or $140, for not having his plane at the airport.

The Acting Comptroller General of the United States in his letter to plaintiff under date of September 10, 1936, stated:

> The charge for the delay in having the airplane at the airport was based on the fact that although by the telegram of September 21, you were given notice to proceed you did not have the plane at the airport until October 8, notwithstanding the contract provided that it should be there within 10 days after notice to proceed.

9. Plaintiff completed his flying on October 29, 1935. He shipped the last of the materials required under the contract on December 5, 1935, from Chicago, Illinois, which materials reached the Soil Conservation Service at Washington, D. C., on December 9, 1935. Pursuant to the provisions of paragraphs 14, 15, and 16 of the specifications, defendant deducted, as liquidated damages, the sum of $1,020, for the period of fifty-one (51) days at the rate of $20 per day. The charge for the delay in the delivery of the maps, etc., was based on the fact that the contract provided that the flying was to be completed within fourteen (14) days after the award and that the maps, etc., were to be delivered within fourteen (14) days thereafter but were not delivered until December 9, 1935.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover a balance of $1,160 for aerial photographic work which he contracted to do and did perform for $2,796.37 and on which the Government has paid him $1,636.37 and has withheld, as liquidated damages at the rate of $20 a day, $140 for an alleged delay of seven days in getting his plane at the airport ready to begin work and $1,020 for an alleged delay of fifty-one days in

transmitting the final prints, etc., to be furnished the Soil Conservation Service at Washington.

It is contended by the defendant that under the contract with plaintiff and the facts in the case the deduction for liquidated damages was proper and justified. This constitutes the issue between the parties.

The evidence shows that on September 14, 1935, the Soil Conservation Service of the United States Department of Agriculture received a bid from plaintiff by which he agreed to make certain aerial photographs in certain States for the sum of $2,796.37. On September 20, 1935, a telegram was sent to the plaintiff stating that his offer was accepted, that a formal contract and performance bond were being prepared and would be sent him for execution and return for final completion by the Department, and that "This is your authority to proceed with work immediately". This telegram was signed by "S. A. Snyder, Department of Agriculture". The bid was made pursuant to an invitation therefor pertaining to certain provisions with reference to the performance of the work and liquidated damages to which reference will be made hereinafter.

Thereafter some communications passed between the plaintiff and Louis A. Woodward, Acting Chief Photogrammetrist of the Department of Agriculture, who appeared to have charge of the matter.

September 28, 1935, Woodward telegraphed the plaintiff that the Presidential Order required the acceptance of Section 14 (b) of the Bituminous Coal Conservation Act of 1935 before the contract for aerial photography could be awarded. September 30, 1935, plaintiff answered accepting the provisions of the act referred to above. October 10, 1935, the plaintiff wrote Woodward inquiring as to what he would consider the date of the award for the purpose of Paragraph 14 of the specifications, referring apparently to the invitation made to bidders; and also stating that "To date we have not received a formal contract". October 18, 1935, Woodward wrote the plaintiff in substance that his office had consulted Mr. F. A. Snyder of the Department of Agriculture in order to obtain a ruling as to the date of

award, and stated that "The date of award will be considered that of the day the formal contract has been signed"; also that "liquidated damages cannot be assessed for not having a plane on the project until ten days after the formal contract has been signed."

On October 18, 1935, plaintiff signed the contract which had been forwarded to him but did not return it to the Department of Agriculture until October 21 and it was signed by the defendant on November 5, 1935. Prior to the signing of the formal contract the plaintiff had proceeded and incurred certain expenses incident to the completion thereof.

The formal contract was returned to the plaintiff on November 26, 1935. Plaintiff contends that this date should be taken as the date of the award while defendant insists that the award was made when the telegram was sent to plaintiff on September 21, 1935, authorizing him to proceed with the work immediately.

In *Cathell* v. *United States*, 46 C. Cls. 368, 371, the court said:

> Neither the contractor nor the defendants incurred liabilities under the contract until it was approved. The defendants were in no position to assert rights under a contract which they neglected to execute.

But in this case it appears that there was a provision for the approval of the contract by a superior officer and in the case before us there is no such provision. Moreover, in the instant case the plaintiff was authorized by telegram to proceed with the work at once before the formal contract was executed and the delay in the execution of the formal contract did not operate to delay the work. A delay under such circumstances was held in *Griffiths* v. *United States*, 77 C. Cls. 542, 552, not to operate as a waiver of the time provisions but that it did operate by implication to extend the time for performance a length of time corresponding to the delay in the approval of the formal contract by defendant. In *Mueller-Huber Grain Co.* v. *United States*, 90 C. Cls. 401, it was said:

> Moreover, the contract did not become effective until it was executed by the defendant on March 27, 1930, and that date operated also to extend the contract time for

performance by the number of days between March 18, when the contract was forwarded to plaintiffs, and March 27, when it was executed by the defendant.

There seems to have been no question raised with reference to the time of delivery of the contract after signature by the defendant in the cases cited above. In the instant case, we think the time of delivery of the signed contract to plaintiff is material, the rule being, as stated in 17 C. J. S. 818, sec. 359—

> In the case of a written contract, the time of its delivery, unless a different intent appears, is ordinarily deemed to be the time when the contract becomes binding. A date on the writing is generally not conclusive, and if delivery is shown to have been at a different time, that time is deemed to be the date of inception of the contract, unless an intention to other effect is otherwise shown.

The formal contract was not delivered to plaintiff until November 26, 1935. Plaintiff contends that the defendant was bound by the advice which he received to the effect that liquidated damages could not be assessed until ten days after the formal contract had been signed. But we need not determine whether the contract is to be construed in accordance with the written statements of an official of the Soil Conservation Service who had charge of the work to be performed. We think the date of delivery fixes the time when the contract went into effect and that the award could not be made until the contract went into effect. On this basis, the plaintiff had ten days after November 26, 1935, to get his plane at the airport and it was already there when the contract was delivered. After the "date of award" he had fourteen days in which to complete the flying and fourteen days after that to complete delivery of materials, that is, until December 24, 1935. The final prints were delivered December 9, 1935. There was therefore no foundation under the final contract for the assessment of liquidated damages.

Counsel for plaintiff calls attention to the fact that after plaintiff's proposal had been accepted he was advised by Woodward (the government agent), who had been conducting the negotiations with him, that no contract could be awarded

for aerial photography until he had accepted a certain provision of the Bituminous Coal Conservation Act, and argues on this ground also that the award could not have been made until the formal contract had been executed and delivered. But in view of what we have said above, we do not think it is necessary to say anything with reference to this matter except that it tends to sustain the argument of plaintiff as to when the award was made.

The defendant relies largely on the case of *American Smelting and Refining Co.* v. *United States*, 259 U. S. 75. In that case, as in the one now before this court, there was an original proposition on the part of the Government and its acceptance by the plaintiff pending the preparation of the formal contract which was subsequently executed. The contract was for the purchase of copper and both in the original proposition and the formal contract the price was fixed at a certain amount which the Government paid. The market price was subsequently increased and the plaintiff sued to recover the amount of the increase alleging duress in executing the formal contract and that the agreements had not been executed in the manner prescribed by law. It was held in substance that the petition failed to show a cause of action under any of the allegations thereof. It is true that the opinion in effect holds that the original proposition and the acceptance thereof by the plaintiff constituted a contract, and it may be conceded that the same rule would apply in the instant case. But this does not affect the principle that all prior negotiations are merged in the final contract between the parties. In the case before us the first agreement was superseded by the formal and final contract which, as we have already held, did not take effect until it was delivered. In the *American Smelting Co. case*, *supra*, the plaintiff was seeking to have both contracts held invalid and to recover on a *quantum meruit* the market value of the copper furnished the Government. The subject matter of the case and its general nature prevent the application to the case now before us of anything said in the opinion rendered.

Syllabus

Plaintiff is entitled to recover the amount of the liquidated damages deducted by the Government in making settlement with him and judgment will be rendered accordingly.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

No. 43816—JANE BANCROFT v. THE UNITED STATES

No. 44632—THE FIRST NATIONAL BANK OF BOSTON AND ANNIE B. COOLIDGE, EXECUTORS UNDER THE WILL OF EMILY L. AINSLEY, DECEASED, v. THE UNITED STATES

No. 44633—THE FIRST NATIONAL BANK OF BOSTON AND ANNIE B. COOLIDGE, EXECUTORS UNDER THE WILL OF EMILY L. AINSLEY, DECEASED, v. THE UNITED STATES

No. 43846—WILLIAM E. BAKER v. THE UNITED STATES

No. 43785—ARTHUR N. MADDISON, EXECUTOR OF GEORGE L. DEBLOIS, v. THE UNITED STATES

No. 43803—MARY B. DEBLOIS v. THE UNITED STATES

[Decided June 3, 1940. Plaintiffs' motions for new trial in Nos. 43816, 44632, 44633, and 43846 overruled October 7, 1940]

On the Proofs

Income tax; date when loss on bank stock was incurred.—Where bank closed its doors in 1932 and entered into liquidation agreement; and where in 1934 an appraisal, for loan purposes, showed an excess of assets over liabilities, and where in 1935 the bank was unable to meet demand for payment of balance due on liabilities assumed, it is held that question of year in which the bank's stock became worthless so as to entitle owners of stock to deduct cost thereof from gross income, for income tax purposes, was a question of fact.

Same.—Where bank was closed in 1932, not because it was then insolvent but because confidence in it had been impaired, and where there was nothing then to indicate that gradual liquidation would not produce amounts sufficient to return to owners of the bank's stock their investment, or a substantial part thereof, it is held that the stock of said bank did not become worthless in that year, 1932, so as to entitle stockholders to deduct cost thereof from gross income for income tax purposes.

Same.—Where in 1934 an appraisal, for loan purposes, of the assets of a bank which in 1932 closed its doors and entered into a liquidation agreement showed an excess of assets over liabilities, it is held that owners of stock in said bank were not entitled to deduct from gross income for that year, 1934, losses on said stock for income-tax purposes.

Same.—Where bank in which plaintiffs were stockholders was closed in 1932 and its assets then taken over for liquidation by another bank, after a run on said bank; and where in 1935 the liquidating bank exercised its rights under the liquidating agreement and made demand for the payment of the balance due on the liabilities assumed, and said bank was unable to meet such demand; it is held that the liability of the said stockholders for any deficiency became at that time fixed, and hence loss was incurred in the year 1935 for the purpose of income-tax deduction.

The Reporter's statement of the case:

Mr. Charles B. Rugg for the plaintiff. *Messrs. John Richardson, H. Brian Holland, James T. Mountz,* and *Ropes, Gray, Boyden & Perkins* were on the brief.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

In each of the above cases, the court made special findings of fact, as follows:

Jane Bancroft v. *United States, No. 43816*

1. During the year 1936 plaintiff, who resides at Cohasset, Massachusetts, was the owner of 100 shares of stock of The Atlantic National Bank of Boston (hereinafter referred to as the "Atlantic"), which she had acquired on July 16, 1934, as a distribution of the principal of a trust under the will of

Clarence W. Barron, of which plaintiff was the sole beneficiary. The shares had been acquired by the trustee of that trust on July 24, 1929, in a transaction entered into for profit at an aggregate cost of $8,173.70.

2. Plaintiff filed an income-tax return for the calendar year 1936 on March 15, 1937. The amount of tax shown on that return was $4,070.70, which plaintiff paid to the collector of internal revenue at Boston, Massachusetts, as follows: $1,017.68 on March 22, 1937; $1,017.68 on June 18, 1937; $1,017.67 on September 17, 1937; and $1,017.67 on December 18, 1937.

3. In that return plaintiff claimed a deduction from gross income in the amount of $8,173.70, representing the adjusted basis to her of the 100 shares of stock of the Atlantic, on the ground that that stock had become worthless during the year 1936. Upon audit of the return the Commissioner of Internal Revenue added to gross income an item of $327.24, which is not now in dispute, and disallowed the deduction of $8,173.70 on the ground that the stock became worthless in the year 1932, and determined a deficiency of $2,088.21, of which $2,012.95 resulted from the disallowance of the deduction of $8,173.70.

4. July 31, 1937, plaintiff paid to the collector, pursuant to assessment, an additional income tax for the year 1936 of $2,088.21, with interest thereon in the sum of $47.26, of which $45.55 represented interest on $2,012.95.

5. August 16, 1937, plaintiff duly filed a claim for refund of the additional tax and interest, asserting that the stock of the Atlantic did not become worthless in 1932, but became worthless in 1936. This claim was disallowed by the Commissioner by registered letter dated December 6, 1937.

First National Bank of Boston, et al. v. *United States, No. 44632*

First National Bank of Boston, et al. v. *United States, No. 44633*

6. Plaintiffs in the two above-styled cases are the executors under the will of Emily L. Ainsley (hereinafter referred to as the "decedent"), who died November 27, 1936, a resident of Boston, Massachusetts.

7. During the year 1935 and up until the decedent's death in 1936 she owned 50 shares of stock of The Atlantic National Bank of Boston. The decedent had acquired these shares in transactions entered into for profit on October 25, 1929, at an aggregate cost of $6,450.

8. On February 18, 1936, the decedent filed an income tax return for the calendar year 1935. The amount of tax shown thereon was $1,988.83, which the decedent paid in full February 19, 1936.

9. On April 3, 1937, the plaintiffs on behalf of the decedent filed an income tax return for the period from January 1, 1936, to November 27, 1936. The amount of tax shown thereon was $1,118.63, which plaintiffs paid in full on April 7, 1937.

10. In the return filed for the year 1936 plaintiffs claimed a deduction of the cost of said shares on the ground that the stock had become worthless during the period for which the return was filed, to wit, January 1, 1936, to November 27, 1936. The Commissioner disallowed the deduction on the ground that the stock had become worthless in 1932, and determined a deficiency in the amount of $1,012.85.

11. This amount having been paid, plaintiffs filed a claim for refund on December 21, 1937, on the ground that the stock had become worthless in 1936.

12. On March 8, 1938, plaintiffs, on behalf of the decedent, filed a claim for refund of $1,056.50, being a portion of the income tax paid by the decedent for the calendar year 1935, on the ground that if her stock in The Atlantic National Bank did not become worthless in 1936, as claimed, it did become worthless in 1935, and that the plaintiffs were entitled to a deduction of its cost by reason thereof.

13. Both the claim for 1935 and that for 1936 were disallowed by the Commissioner on August 8, 1938.

14. The parties have stipulated that the amount claimed for 1935 is the amount to which plaintiffs are entitled if the Atlantic stock became worthless during that year.

William E. Baker v. *United States, No. 43846*

15. Plaintiff is an individual residing at Boston, Massachusetts.

16. During the year 1936 plaintiff was the owner of 406 shares of stock of The Atlantic National Bank of Boston. Plaintiff had acquired these shares in transactions entered into for profit as follows:

50 shares by subscription July 2, 1929	$3, 125
156 " " " March 1, 1932	3, 120
200 " " purchase February 23, 1934	106
Total cost	$6, 351

17. Plaintiff filed an income-tax return for the calendar year 1936 on March 15, 1937. The amount of tax shown on that return was $1,129.93, which plaintiff paid in full March 17, 1937.

18. In his income-tax return for the year 1936 plaintiff claimed a deduction in the amount of $6,351, representing the adjusted basis to him of the 406 shares of stock of the Atlantic acquired by him, as set out above, on the ground that that stock had become worthless during the year 1936. Upon audit of that return the Commissioner of Internal Revenue added to gross income an item of $821.17 which is not now in dispute, and disallowed the deduction of $6,351, on the ground that the stock of the Atlantic became worthless in the year 1932. As a result of these adjustments the Commissioner determined a deficiency of $1,101.51, of which $1,033.93 resulted from the disallowance of the deduction of $6,351.

19. August 14, 1937, plaintiff paid, pursuant to assessment, an additional tax for the year 1936 of $1,101.51, with interest thereon in the sum of $27.34, of which $25.84 represented interest on $1,033.93.

20. August 16, 1937, plaintiff duly filed a claim for refund of the additional tax and interest thereon paid by him, asserting that the stock of the Atlantic did not become worthless in 1932, but became worthless in 1936. That claim was disallowed by the Commissioner by registered letter dated February 1, 1938.

Arthur N. Maddison, Executor, v. *United States, No. 43785*

21. Plaintiff is the duly qualified executor under the will of George L. DeBlois (hereinafter referred to as the "de-

cedent"), who died May 4, 1939, and who at the date of his death was a resident of Boston, Massachusetts.

22. During the year 1932 decedent was the owner of 517 shares of stock of The Atlantic National Bank of Boston. Decedent had acquired these shares in transactions entered into for profit at various times between 1917 and 1932, inclusive, at an aggregate cost of $11,562.74.

23. Decedent filed an income-tax return for the calendar year 1932 on or about March 15, 1933. The amount of tax shown on that return was $10,390.76 which decedent paid as follows: $2,448.94 on March 23, 1933; $595 on May 4, 1933; $2,448.94 on June 21, 1933; $2,448.94 on September 20, 1933; and $2,448.94 on December 18, 1933.

24. June 10, 1935, decedent filed a claim for refund of $999.31 of the income tax paid by him for the year 1932 as set out above, asserting that the 517 shares of Atlantic stock which he owned became worthless during the year 1932. That claim was disallowed by the Commissioner of Internal Revenue by registered letter dated December 11, 1935.

25. Thereafter decedent requested reconsideration of his claim for refund. In reply the Commissioner wrote decedent on December 3, 1937, conceding plaintiff's contention that his Atlantic stock had become worthless in 1932 and determining on that account an overassessment of $2,852.33. The said certificate of overassessment was delivered to the Collector, but was not transmitted by him to decedent because, as the Commissioner advised decedent, suits had been filed in other cases contending that the Atlantic stock became worthless in 1936. For this reason the certificate of overassessment was canceled pending final determination of the year in which the stock in fact became worthless. No part of the tax for 1932 has been refunded to plaintiff or his executor.

Mary B. DeBlois v. *United States, No. 43803*

26. Plaintiff is an individual residing at Boston, Massachusetts.

27. During the year 1932 plaintiff was the owner of 150 shares of stock of The Atlantic National Bank of Boston.

Plaintiff had acquired these shares in transactions entered into for profit at various times between 1920 and 1929, inclusive, at an aggregate cost of $8,250.

28. Plaintiff filed an income-tax return for the calendar year 1932 on or about March 15, 1933. The amount of tax shown on that return was $2,127.21, which plaintiff paid as follows: $531.81 on March 16, 1933; $531.80 on June 21, 1933; $531.80 on September 20, 1933; and $531.80 on December 18, 1933. Thereafter the Commissioner of Internal Revenue determined that plaintiff was subject to an additional tax for the year 1932 of $402.71, which amount, with interest in the sum of $33.23, plaintiff paid July 27, 1934.

29. On June 10, 1935, plaintiff filed a claim for refund of $1,998.11 of income taxes paid for the year 1932, on the ground that the 150 shares of Atlantic stock which she owned became worthless in 1932. This claim was disallowed by the Commissioner by registered letter dated January 9, 1936. Thereafter plaintiff requested reconsideration of that claim by the Commissioner and under date of January 27, 1939, the Commissioner advised plaintiff by letter that her request for reconsideration was denied.

The facts applicable to all the cases are as follows:

FINDINGS OF FACT COMMON TO ALL SIX CASES

30. The Atlantic was organized as a State bank in 1828 and converted into a national bank in 1864. It had a main office and branch offices in Boston, Massachusetts. November 20, 1931, it had book assets of approximately $142,000,000, deposits of $116,000,000, and a net worth of $17,587,000. Its capital was then $9,875,000, consisting of 395,000 shares with a par value of $25 each. It was the third largest bank in Massachusetts.

31. The senior national bank examiner for the First Federal Reserve District made an examination of it as of November 20, 1931, and rendered a report in which he classified assets to the extent of $2,909,947.65 as "Doubtful" and $3,068,418.89 as "Loss" and in addition classified items as "Slow" to the extent of $16,318,816.12. December 24, 1931, the City of Boston withdrew from the Atlantic approximately $1,500,000 in cash. Rumors were circulated

regarding the condition of the bank and a substantial amount of other deposits were withdrawn. January 9, 1932, representatives of the Atlantic conferred with representatives of The First National Bank of Boston (hereinafter sometimes referred to as the "First"), the largest bank in New England, and of the National Shawmut Bank of Boston, the second largest, about the need of the Atlantic for new capital. The conferees believed that $10,000,000 of new capital would make the position of the Atlantic impregnable and that a lesser amount, about $8,000,000, would adequately protect the bank. It was proposed that the par value of the Atlantic stock should be reduced from $25 per share to $10 per share, that the Atlantic stockholders and their friends should subscribe $5,000,000 for new stock, and that the clearing-house banks would match this money dollar for dollar up to $5,000,000. The new stock was to consist of 500,000 shares to be sold at a price of $20 a share, of which $10 was to go into capital and $10 into surplus. Atlantic stockholders and their friends promptly subscribed more than their allotment of 250,000 shares. Of these shares Atlantic directors agreed to take approximately 85,000, savings-bank stockholders approximately 100,000 costing $2,000,000, and other stockholders approximately 65,000. The clearing-house banks, instead of subscribing directly for the remaining 250,000 shares as originally proposed, formed a syndicate which loaned $5,000,000 to the Post Office Square Securities Corporation, a former subsidiary of the Atlantic, the First National Bank participating to the extent of approximately $2,500,000. The Post Office Square Securities Corporation then purchased 250,000 shares of the new stock for $5,000,000, and pledged this stock to the syndicate as security for the loan.

32. March 8, 1932, the capital of the Atlantic was reduced from $9,875,000 to $3,950,000 by the reduction of the par value of its shares from $25 per share to $10 per share, and then increased from $3,950,000 to $8,950,000 by the issuance of 500,000 new shares. New money in the amount of $10,000,000 was paid into the bank, $5,000,000 going into capital and $5,000,000 into surplus. This recapitalization was

effected with the knowledge and approval of the Comptroller of the Currency.

On the same day the directors authorized the charging off of $10,500,000 book value of assets, including all items shown as "Loss" and most of the items shown as "Doubtful" in the report of the national bank examiner. By reason of these charge-offs the book net worth was not substantially affected by the addition of the new capital.

33. November 20, 1931, the total deposits of the Atlantic were approximately $116,000,000; January 1, 1932, $96,000,000; January 31, 1932, $85,600,000; April 1, 1932, $82,800,000, and April 21, 1932, $82,500,000. April 25, 1932, the Exchange Trust Company, a small independent Boston bank, closed its doors, and as a result further rumors concerning the condition of the Atlantic were circulated and a run occurred on the latter for several days prior to May 3, 1932, which run was the immediate cause of the closing of the Atlantic. April 26, 1932, Atlantic deposits had fallen to approximately $78,500,000, and April 30, 1932, to $67,500,000. May 3, 1932, the deposits were $64,100,000.

34. May 1, 1932, after conferences between representatives of the Atlantic, the First, and the National Shawmut Bank, it was decided that the First should take over the Atlantic. May 2, 1932, at the request of the First, the Atlantic applied to and obtained from the Reconstruction Finance Corporation a secured loan of $10,000,000. The purpose of this loan was to provide ready cash in case withdrawals of deposits should continue after the take-over.

35. May 3, 1932, the Atlantic and the First entered into an agreement (hereinafter referred to as the "May 3 agreement"), the significant provisions of which were as follows:

(a) The Atlantic transferred to the First all of its assets (except leases, employment contracts, office furniture and fixtures and property held as fiduciary). The First assumed the deposit and acceptance liabilities of the Atlantic and was authorized to pay other claims against the Atlantic.

(b) The First agreed to apply the assets transferred to it as a credit upon the liabilities assumed by it as follows: Cash, forthwith; United States Government obligations,

forthwith, at May 3 prices; loans, at face value plus accrued interest whenever the First was willing to purchase them on that basis; other assets, which the First was willing to purchase at less than face value, as agreed to by the First and a representative of the Atlantic. The First agreed to liquidate all other assets with due and reasonable care and diligence and to credit the net cash proceeds thereof as received. The Atlantic agreed to pay interest on the daily balance of liabilities assumed by the First, less credits applied, at the rate of 5% per annum, chargeable quarterly. Such interest as it accrued was to be treated as a liability assumed. The First agreed to turn over to the Atlantic any surplus remaining after payment of all liabilities assumed by it.

(c) The agreement was for a term of three years, expiring April 30, 1935, subject to extension at the option of the First for a further period ending not later than April 30, 1936. The Atlantic agreed to pay the First on demand at the end of the three-year period, or any extension thereof, any unpaid balance of the liabilities assumed by the First. Upon payment of such balance the First agreed to return to the Atlantic any remaining assets.

(d) The First agreed to render quarterly accounts to the Atlantic covering the operations of the First under the agreement, such accounts to be presented for approval by the Atlantic and submitted to arbitration in the event of any dispute.

(e) The First could at any time and from time to time sell, assign, transfer, and deliver the whole or any part of the assets of the Atlantic transferred under the agreement at public or private sale at the option of the First and without advertising the same and without notice to the Atlantic or to anyone else, and with the right in the First to be a purchaser at any public sale or sales.

(f) If at the expiration of the liquidation period the liabilities assumed exceeded the proceeds realized from the assets, the First had the right to assert against the stockholders of the Atlantic a claim for the deficiency up to the limit of their additional liability under the law.

The May 3 agreement was treated by the parties as a collateral-loan transaction under which the First assumed sub-

stantially all the liabilities of the Atlantic, taking as security the assets of the Atlantic which the First agreed to liquidate in an orderly fashion, turning over to the Atlantic any surplus remaining after repayment of the loan, and the Atlantic being liable for any deficiency.

36. May 5, 1932, the Atlantic, in a letter to its stockholders, signed by Harry K. Noyes, after explaining the agreement between the two banks, stated, in part, as follows:

> It will convert the assets of the Atlantic Bank in an orderly fashion with due regard for your interests as shareholders of the Atlantic Bank, accounting to the Atlantic Bank for any excess after proper charges, the Atlantic Bank being liable for any deficiency. Until the Atlantic Bank's assets are converted, its liabilities paid, and its affairs wound up, it remains in existence and holders of its stock remain shareholders.
>
> Surplus assets, if any, will be distributed to Atlantic Bank shareholders when the affairs of the Bank are wound up. Your directors are hopeful that there will be a surplus available for distribution.

37. June 6, 1932, the Atlantic stockholders voted to ratify the May 3 agreement. June 24, 1932, they voted (a) to place the bank in voluntary liquidation under Sections 5220 and 5221 of the Revised Statutes; (b) to appoint Waldron H. Rand Jr., a former vice-president of the bank who had been made president after May 3, as liquidating agent; and (c) to close the stock transfer books.

38. July 14, 1932, the First paid off the $10,000,000 Reconstruction Finance Corporation loan of May 2, 1932, and thereafter administered under the May 3 agreement the collateral pledged to secure that loan.

39. The original three-year term of the May 3 agreement ran to April 30, 1935. April 29, 1935, the term of the agreement was extended by the First to November 30, 1935. In fixing this date for the termination of the extension, the representatives of the First were influenced by the fact that two of the largest holders of Atlantic stock, Messrs. Charles H. Farnsworth and Harry K. Noyes, had died in 1933 and 1934, respectively, and that the period of limitation for enforcing stockholders' liability against Mr. Farnsworth's estate would expire on March 23, 1936. December 2, 1935,

immediately following the expiration of the extension period, the First, to preserve its rights, made formal written demand on the Atlantic for payment of the balance of the liabilities assumed. No steps were taken at that time to enforce the demand, and the liquidation proceeded as before without the demand having been met by the Atlantic.

40. In March 1936 the Comptroller of the Currency made an examination of the Atlantic to determine whether a receiver should be appointed and an assessment levied in order to fix the liability of the stockholders, particularly in view of the approaching expiration of the period of limitation in the case of the Farnsworth estate. He determined that on the basis of quick realizable values there was a deficiency and on March 18, 1936, he appointed a receiver. March 21, 1936, the Comptroller assessed Atlantic stockholders $10 per share, the full amount of their statutory liability, payable March 26, 1936. However, the full amount assessed was not paid, as will hereinafter appear from finding 48.

41. The liquidating agent of the Atlantic rendered annual reports to the Comptroller of the Currency as of January 31, 1933, 1934, and 1935 showing net book worth on each of those dates as follows: January 31, 1933, $14,957,307.05; January 31, 1934, $11,664,967.93; January 31, 1935, $10,739,505.28.

42. The liquidating agent also rendered reports to the stockholders of the Atlantic at their meetings held January 10, 1933, January 9, 1934, and March 3, 1936, showing net book worth as of the preceding October 31 as follows: October 31, 1932, $15,677,155.20; October 31, 1933, $12,152,034.06; and October 31, 1935, $10,546,233.42. In each of his reports to the stockholders and to the Comptroller the liquidating agent stated that it was impossible to forecast the final result of the liquidation.

43. The senior national bank examiner, who had made the examination of the Atlantic on November 20, 1931, made an examination of the First National Bank as of June 24, 1932. This examination included an appraisal of the interest of the First (approximately $2,500,000) in the $5,000,000 loan made by the syndicate of clearing house banks to the Post Office Square Securities Corporation, which involved an ap-

praisal of the Atlantic stock held as collateral. The examiner classified the loan as 50% "Loss," 25% "Slow," and 25% "Doubtful." As of November 25, 1932, he again examined the First and appraised the loan, classifying it this time as 75% "Loss" and 25% "Doubtful." As of June 9, 1933, he again examined the First and again classified the loan as 75% "Loss" and 25% "Doubtful." The bank examiner, in making these three appraisals, had before him the records of the First in regard to the liquidation.

44. In July 1934 an examination of the Atlantic assets was made by the Reconstruction Finance Corporation in connection with the application of the Atlantic for a long-term loan of approximately $12,000,000 for the purpose of assuring a more gradual liquidation of its assets at a reduced rate of interest. The loan was to be secured by certain of the Atlantic assets then held by the First. In addition, the First was prepared to purchase certain other Atlantic assets with a book value of $9,020,335.15 for approximately $7,029,000. The proceeds of the proposed loan and sale of assets were to be used to discharge the indebtedness then owing to the First of $19,220,900.41.

The examiner valued the collateral to be given the Reconstruction Finance Corporation at $13,656,360.18 on the basis of a liquidation period of at least five years, and recommended a loan of $11,250,000.

The remaining assets, exclusive of those to be sold to the First, were appraised at $1,204,885. Based on the foregoing valuations the total assets of the Atlantic were $21,890,245.18, which was $2,669,344.77 in excess of its total liabilities as of that date. On this basis the 895,000 shares of Atlantic stock outstanding had an ultimate liquidating value of approximately $2.98 a share.

45. Discussions and negotiations with the view of extending for a further period of several years the time for the liquidation of the remaining Atlantic assets were begun in the spring of 1935. In general the plans proposed contemplated that the period of liquidation should be extended for several years; that the stockholders should retain their equity in the assets and be relieved of double liability on their shares, provided additional collateral should be furnished to

the First in the form of immediate advances of from $1.00 to $2.00 a share by stockholders and their agreement to make further specified payments, if called for by the First, at stated intervals. The additional collateral called for by these plans was to replace the right held by the First to enforce the double liability of the stockholders.

46. A rough appraisal of the Atlantic assets as of September 18, 1935, was made by officers of the First, the liquidating agent, and representatives of the Atlantic. The appraisal was made on two bases, one assuming an immediate sale of the assets and the other assuming liquidation over a period of at least three years. On the immediate-sale basis the appraisal showed a value for the assets of $12,528,509 and a deficit upon immediate liquidation of $2,278,946, and on a deferred-liquidation basis, a value of $15,964,868, and a recovery for the stockholders of $1,157,413. Bonds and securities were valued, for the purpose of the immediate-sale basis, at the market price as of that date, whereas on the deferred basis allowances were made for possible increases over a three-year period. In making the appraisal no consideration was given to recoveries on charged-off assets; collateral loans were valued solely on the basis of the collateral even though the borrower was making payments of interest and principal; and the bank building which had been erected by the Atlantic in 1930 at a cost of approximately $4,000,000 was valued at $1,000,000 on the basis of immediate sale and at $2,000,000 on the deferred basis. In general the values on the immediate-sale basis represented the amounts at which the First stated that it would be willing to take over the assets in settlement of the Atlantic's indebtedness to it. The Atlantic representatives were of the opinion that any deficit resulting from immediate sale of the assets would be considerably less than $2,300,000, but all agreed that the deficit would be not less than $1,000,000.

47. During 1935 and the early part of 1936 there were frequent conferences between representatives of the Atlantic, the other Boston banks, and the First, on a plan for deferred liquidation of the remaining assets, and plans for the settlement of the assessment against stockholders by a single payment and the surrender of their interest in the assets.

In June 1936, an "alternative plan" was suggested under which stockholders could elect either (a) to settle their liability by paying $1.60 per share and surrendering their equity or (b) to retain their equity and settle their liability by paying $1.10 per share forthwith, an additional $1.05 at the end of three years, if called for by the First and another $1.05 at the end of six years, if called for by the First.

48. Finally a plan was proposed, and later accepted, which provided that each stockholder of the Atlantic desiring to participate should pay to a depositary the sum of $1.75 per share; that upon approval of the plan by the United States District Court, the depositary should pay to the receiver from $1.50 to $1.60 per share on all participating shares, depending on the number of shares participating; that the depositary should thereupon deliver to each participating stockholder a release and discharge of his statutory liability; that payment of expenses, not to exceed 15 cents per share, should be made by the depositary; and that any balance of funds remaining should be distributed to participating stockholders. Upon final approval by the court, all the remaining assets of the Atlantic, together with the sums paid in by the stockholders and all rights against nonparticipating stockholders, were to become the property of the First, which was then to exchange mutual releases with the receiver.

This plan was duly accepted by holders of 600,938½ shares of Atlantic stock, who paid to the depositary $1.75 per share of stock held by them. On November 13, 1936, the United States District Court approved the plan and authorized its consummation. Shortly thereafter the plan was consummated.

49. The participation of the First in the $5,000,000 loan to the Post Office Square Securities Corporation was not charged off as a loss on the books of the First until 1936.

50. There were sales of Atlantic stock at public auction and at private sale from May 3, 1932, to June 24, 1932, while the transfer books were open, and thereafter from time to time up to and in the year 1936. Prices paid for the stock at public auction in the year 1932 after May 3 ranged from 40 cents to $2.06¼, the highest price being paid in the month of September. Prices paid at private sales during

the same period ranged from 10 cents to $1.50 per share. In 1933 prices at private sale ranged from 10 cents to $1.50 per share, and at auction from 12 cents to $1; in 1934 at private sales from 10 cents to $1.00 and at auction there was a sale at 20 cents; in 1935 prices at auction ranged from 31 cents to 75 cents; in 1936 the stock was quoted at 10 cents to 40 cents, and prices at auction ranged from 33 cents to 39 cents.

After the closing of the transfer books on June 24, 1932, the seller, at each public and private sale, agreed to pay over any dividends to the purchaser. The purchases and sales of stock at both private and auction sales were made without agreement as to stockholders' liability.

51. Until the year 1935 it was reasonable to expect that the Atlantic stockholders would recover some part of their investment in the Atlantic stock, though throughout such period, after the summer of 1932, the Atlantic stock had no, or at most only a nominal, readily realizable cash value. In the year 1935, on or about December 2, it ceased to be reasonable to expect that the Atlantic stockholders would recover any part of their investment in that stock.

The court decided that the plaintiffs in Nos. 43816, 44633, 43846, 43785, and 43803 were not entitled to recover, and that in No. 44632 the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court.

The plaintiffs in all of the above styled cases were stockholders in The Atlantic National Bank of Boston. On May 3, 1932, this bank closed its doors and entered into an agreement with The First National Bank of Boston for the liquidation of its affairs. This liquidation proceeded until March, 1936, when the Comptroller of the Currency appointed a receiver and levied an assessment against the stockholders of the bank, which was satisfied on August 17, 1936, by the payment of $1.75 per share. The question presented is the year in which the stock of the Atlantic became worthless and its stockholders thereby sustained a loss.

The Commissioner of Internal Revenue has held that the loss was sustained in 1932. In the cases of *Bancroft* v. *United*

States, *Baker* v. *United States*, *and First National Bank of Boston, et al. v. United States* (No. 44633) the plaintiffs filed claims for refund claiming the loss was sustained in 1936. In the *Maddison* and *DeBlois* cases the plaintiffs claimed the loss was sustained in 1932, and in the case of *First National Bank of Boston, et al* v. *United States*, No. 44632, the plaintiff claimed the loss was sustained in 1935. They all now take the position that the loss was sustained in 1936.

Section 23 (e) of the Revenue Act of 1936 permits a deduction of "losses sustained during the taxable year and not compensated for by insurance or otherwise." A ticle 23 (e)-1 of Treasury Regulations 94 provides, in par.:

> In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses.

Article 23 (e)-4 provides, in part:

> If stock of a corporation becomes worthless, its cost or other basis as determined and adjusted under Section 113 is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness.

Articles 141 and 144 of Treasury Regulations 45 contain provisions similar to the above except that in them it is not provided that the loss should be fixed by identifiable events. These regulations were approved by the Supreme Court in *United States v. White Dental Co.*, 61 Ct. Cls. 143, 274 U. S. 398.

The question presented is one of fact. It was presented to the District Court of Massachusetts in the case of *Smith* v. *United States*, 16 F. Supp. 393. That court held that the stock became worthless in 1932 when the bank closed its doors. It relied upon and quoted from the opinion of the District Court for the Eastern District of Pennsylvania in the case of *In re: Hoffman*, 16 F. Supp. 391, which was later affirmed by the Circuit Court of Appeals, 87 F. (2d)

200. The facts in the two cases are the same except that in the *Hoffman* case the bank had been closed by order of the authorities, whereas, in the *Smith* case it voluntarily closed.

We are unable to agree with the District Court that this loss occurred in 1932. The record before that court was by no means so full as the one before us. What its decision would have been had it had before it all the facts now presented is a matter of conjecture.

After a report of the national bank examiner in November 1931 had shown that the bank's affairs were in an unsatisfactory condition, its representatives met with representatives of the First National Bank and of the National Shawmut Bank of Boston, the two largest banks in Boston, with the view of increasing its capitalization, and so putting it on a sound financial basis. The representatives of these three banks agreed among themselves that additional capital of $8,000,000 would adequately protect the bank, but that if $10,000,000 of additional capital could be secured, the position of the bank would be impregnable. It was decided to raise $10,000,000. The Atlantic stockholders, to whom one-half of the stock was offered, immediately subscribed more than their allotment. The other one-half of the stock was to be subscribed for by the clearing-house banks in Boston. These banks did not subscribe directly for the stock, but instead loaned to the Post Office Square Securities Corporation $5,000,000 with which this corporation purchased the remaining $5,000,000 of the new capital, pledging this stock as security for its note with the banks. The new stock was sold at a price of $20.00 a share, $10.00 of which was paid-in surplus. The par value of the old stock in the bank was reduced from $25.00 a share to $10.00 a share.

This readjustment of its capital took place on March 8, 1932. At that time it is beyond question that not only the bank's own stockholders, but also the other financial institutions of the City of Boston believed that the stock in the bank was worth approximately what they paid for it. They were not making donations to charity.

Nothing happened in the year 1932 to make them change their minds except the closing of the bank and the transfer

of its assets to the First for liquidation. Was this sufficient to cause them to reverse their opinion of two months ago? We think not. The bank was closed not because it was insolvent or because the stockholders believed it to be insolvent, but because confidence in it had been impaired and because the deposits were constantly declining, culminating in a run on the bank for several days prior to its closing. No bank, of course, maintains its affairs in a sufficiently liquid state to pay all of its depositors at one time. For exactly this reason it was necessary for it to close its doors and liquidate its affairs gradually. There is nothing to indicate that such a gradual liquidation would not have produced amounts sufficient to return to the stockholders their investment or a substantial part thereof, except only the fact that no institution in liquidation can realize from its assets as much as it can as a going concern. But while this made the value of the stock decline in value, it certainly did not make it worthless. *Lyon v. United States*, 78 Ct. Cls. 545.

In this connection it is interesting to note that the records of the office of the Comptroller of the Currency show that of the 6007 banks which went into voluntary liquidation from 1865 to 1938 and transferred their assets to some other bank, only 258 of them later went into the hands of a receiver. His records further show that of the 2974 banks that actually went into the hands of a receiver in the years 1865 to 1939, 293 of them, or about 10 percent, have paid their creditors in full, leaving $6,000,000 in cash and $35,000,000 book value of other assets for distribution to the stockholders. The mere closing of the doors of this bank did not make its stock worthless.

The only other things which happened in this year which reflect on the value of this stock are the reports of the senior national bank examiner for the First Federal Reserve District on the loan of the First National Bank to the Post Office Square Securities Corporation, which was secured by the Atlantic's stock. On June 24, 1932, he classified this loan as 50 percent "loss," 25 percent "slow," and 25 percent "doubtful." Subsequently, in November 1932, and again in June 1933, he classified it as 75 percent "loss" and 25 percent "doubtful." It thus appears that in the opinion of this

qualified authority there was in 1932 a not inconsiderable prospect of realizing a substantial amount on this stock. If this be true, it cannot be said that the stock was then worthless.

Nor can we say this stock was worthless in 1934. In that year the bank's total liabilities were $19,220,900.41, all of which it owed to the First National Bank. It was proposed to discharge this indebtedness by a loan of $12,000,000 from the Reconstruction Finance Corporation and by the sale to the First of a portion of its assets for $7,029,000. The Reconstruction Finance Corporation made an appraisal of all of its assets, exclusive of those to be sold to the First National Bank, at $14,861,245.18. This, added to the $7,029,000 to be paid by the First National Bank, gives a total valuation for all of its assets of $21,890,245.18, an excess of assets over liabilities of $2,669,344.77. It then had 895 shares of stock outstanding, which indicated a value of about $3.00 a share. The par value of the shares was $10.00.

In view of the foregoing, we do not think it can be said that the stock was worthless even as late as July 1934, the date of the appraisal by the Reconstruction Finance Corporation.

However, an event happened in 1935 which in our opinion demonstrated in that year that the stock was worthless.

The liquidation agreement between the First National Bank and the Atlantic National Bank provided for a liquidation over a period of three years, subject to the option of the First National Bank to extend this period for an additional time not to exceed one year. If at the end of the liquidation period the proceeds of the assets had not been sufficient to repay the First for the liabilities assumed, the First had the right to demand payment from the Atlantic of this deficiency, and upon default in its payment, to assert against the Atlantic stockholders a demand for the payment of their additional stockholders' liability in an amount sufficient to meet the deficiency.

Just before the expiration of the three-year term the First extended the liquidation period, not for an additional year, but only until November 30, 1935, since two large stockholders of the Atlantic had died since the liquidation agree-

ment and the time within which the First could assert claims against their estates for additional stockholders liability would shortly expire. Two days after the expiration of this extension on December 2, 1935, the First made demand on the Atlantic for the payment of the balance due on the liabilities assumed. The Atlantic was unable to meet the demand. Thereupon the liability of the Atlantic stockholders for any deficiency became fixed.

A rough appraisal of the Atlantic's remaining assets made by representatives of the First and of the Atlantic at about this time showed a deficit of $2,278,946, based upon an immediate sale. Based on liquidating the assets over a three-year period, they were appraised at something over a million dollars more than the liabilities; but it seems to us that only their cash price was material. The liquidation period was over. When it expired the First had the right to put up the remaining assets for immediate sale. What the assets would bring if the contract were carried out according to its terms is the material inquiry; not what they would bring if the contract was voluntarily set aside or amended. If this be correct, on the date of the default in meeting the demand of the First the stockholders of the Atlantic became liable for the payment of approximately $2,278,946, and the value of their stock was then extinct. It is true the First did not put up for sale the Atlantic assets, but their forbearance to do so was a matter of grace, and not a right which the Atlantic stockholders could demand. *United States* v. *White Dental Company*, 61 Ct. Cls. 143, 274 U. S. 398, 402.

We hold accordingly that the stock was determined to be worthless not later than the date of the demand of the First for the payment of the deficiency. At that time "all reasonable possibility of realization of something on the stock" was "destroyed." *Montgomery* v. *United States*, 87 Ct. Cls. 218. Certiorari denied, 307 U. S. 632. *Forbes* v. *Commissioner*, (4 C. C. A.,) 62 F. (2d) 571.

It results that the petitions of *Jane Bancroft* v. *United States*, No. 43816, and of the *First National Bank of Boston and Annie B. Coolidge, Executors under the will of Emily L. Ainsley, deceased*, v. *United States*, No. 44633, and *William E. Baker* v. *United States*, No. 43846, and of *Arthur N.*

Maddison, Executor of George L. DeBlois, v. *United States*, No. 43785, and *Mary B. DeBlois* v. *United States*, No. 43803, must be dismissed; and it further results that plaintiffs in *First National Bank of Boston and Annie B. Coolidge, Executors under the will of Emily L. Ainsley, deceased*, v. *United States*, No. 44632, are entitled to recover of the defendant the sum of $1,056.50, with interest as provided by law. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

FRANK L. ACH v. THE UNITED STATES

[No. 43331. Decided June 3, 1940]

On Motion for New Trial

Pay and allowances; failure to file claim within statutory limitation.—Under the provisions of section 2 of the act of January 19, 1929, it is held that the claim set up in the instant case is barred.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

On March 4, 1940, the court as a conclusion of law decided that the plaintiff was entitled to recover and, accordingly, judgment was rendered for the plaintiff in the sum of $2,291.33. Opinion by Green, *Judge*, with Williams, *Judge*, and Littleton, *Judge*, concurring, and Whaley, *Chief Justice*, dissenting. Whitaker, *Judge*, took no part in the decision of this case.

On June 3, 1940, the defendant's motion for new trial was sustained, the former opinion withdrawn and judgment thereunder set aside, and the petition dismissed. Thereafter, on October 7, 1940, plaintiff's motion for new trial was overruled.

Special Findings of Fact

The court made special findings of fact as follows, on March 4, 1940:

1. Plaintiff was appointed a Captain in the Fleet Marine Corps Reserve March 21, 1930, and on May 3, 1930, was assigned to duty with a branch of that service designated the "20th Marines" under an order from the Major General Commandant, United States Marine Corps, reading as follows:

> 1. You are hereby assigned to the 20th Marines and will report to the Commanding Officer, 20th Marines, 458 Louisiana Avenue NW., Washington, D. C., for duty therewith.

2. May 5, 1930, plaintiff was detailed as Commanding Officer Company A, 20th Reserve Regiment, and continued in that position until about June 1931, when the organization designation was changed to the 23rd Reserve Regiment. Later the organization became known as the Sixth Marine Reserve Brigade. Plaintiff's company designation ("A") remained unchanged during the period of his service. Throughout the period from May 5, 1930, until November 15, 1934, plaintiff was Commanding Officer of Company A with the rank of Captain under the appointment and designations set out above. November 15, 1934, he was transferred to the Eastern Reserve Area and in April 1935 he was placed on the honorary retired list, due to physical disability.

3. The Marine Corps Reserve was organized pursuant to an Act of Congress approved February 28, 1925, to provide for the creation, organization, administration, and maintenance of a Naval Reserve and a Marine Corps Reserve. The Marine Corps Reserve consisted of two classes, namely, the Fleet Marine Corps Reserve and the Volunteer Marine Corps Reserve. As heretofore shown, plaintiff belonged to the Fleet Marine Corps Reserve.

4. The organization to which plaintiff was originally assigned, 20th Marines, was organized pursuant to an order dated November 15, 1929, such order being issued by the Major General Commandant, United States Marine Corps,

to Col. J. S. Turrill, United States Marine Corps, Officer in Charge of Reserve. The order stated: "The 20th Marines will be formed in Washington, D. C., and vicinity, and in Virginia," and that "The Major General Commandant desires that Captain Joseph J. Staley, F. M. C. R., organize this regiment under your supervision, and command it when formed." Then followed a designation of the units which would comprise the organization, including the company of which plaintiff was in charge, and a table of personnel showing the authorized complement of the units. Then followed the statement:

> (c) The personnel of the regiment will be members of the Fleet Marine Corps Reserve. They will be required, unless excused by the Major General Commandant, to perform not more than fifteen (15) days of training annually, for which they will receive the pay of their grades in addition to transportation and subsistence. No pay will be provided for weekly drills.

5. March 18, 1931, another order similar in character to the one mentioned in Finding 4 was issued in connection with the incorporation of the personnel of the 20th Marines into an organization known as the Sixth Marine Reserve Brigade. That order likewise carried a paragraph which was identical in terms with that quoted in Finding 4.

6. Written orders from the Commandant of the Marine Corps were never considered necessary for the Brigade to perform drills.

On October 7, 1931, Colonel Staley issued an order addressed to all officers of the Sixth Brigade which read in part as follows:

> (1) Drills are held Monday evening of each week. Officers are expected to attend. Uniform.
>
> (2) Government property may require care. Please check articles issued you.

On January 1, 1932, Colonel Staley issued a Brigade regulation which read in part as follows:

> Regimental, Battalion, and Company Headquarters will drill weekly. That is, the units or sections of these organizations will prepare to transact business one evening each week.

Colonel Staley was a Lieutenant Colonel with an office at the headquarters of the Marine Corps, and an assistant under Col. J. S. Turrill, who was in charge of reserves throughout the United States. Pursuant to these orders and regulations, plaintiff performed at least one drill weekly during the period May 1, 1930, to June 30, 1934, in a satisfactory manner. During several weeks of the above period two or three drills a week were held, although the holding of more than one drill a week was optional. The extra drills were performed for the purpose of bringing the organization to a higher degree of efficiency. Also during July or August of that period plaintiff performed annual training duty for a period of 15 days and received the pay and allowances of a captain in the Marine Corps for such periods of duty. Pay for these periods of duty last mentioned are not involved in this proceeding.

7. Plaintiff as Captain in command of Company A had charge of the health and welfare of his company and trained them in the art of military practices. As part of his administrative duties he took care of the correspondence, maintained the service record books in his company, rated them on military efficiency, sobriety, and character, supervised the transfer of men to, and their discharge from, his company, and had charge of the equipment of his company of the approximate value of $5,000 for which he was held responsible. Plaintiff faithfully performed his administrative duties in a satisfactory manner.

8. No appropriation was made by Congress to pay for weekly drills for the Fleet Marine Corps Reserve for the period prior to June 30, 1934, and, by reason of the lack of an appropriation, the men who became members of that organization were notified, as stated in Findings 4 and 5, that no pay would be provided for such drills.

9. A record was kept in plaintiff's company of the attendance of the officers, including plaintiff, at weekly drills and of the performance of their duties. However, since no funds were available to pay for those drills, no certificate was issued by plaintiff's next superior commanding officer showing that plaintiff had attended the weekly drills and per-

formed his administrative duties in a satisfactory manner. For the same reason no pay-roll vouchers were ever prepared for such services.

Officers in the Fleet Marine Corps Reserve who failed to perform their drills or administrative duties were transferred out of the organization or otherwise separated therefrom.

10. If plaintiff is entitled to receive pay for the actual number of drills he was required to and did perform from May 1, 1930, to June 30, 1934, not counting drills performed while on annual training duty, he would be entitled to receive pay for 209 drills at $6.37 a drill, or a total of $1,331.33.

If plaintiff is entitled to recover administrative duty pay as the Commanding Officer of Company A at the rate of $240 a year from May 1, 1930, to June 30, 1934, not counting the time he was on annual training duty, there would be due him the sum of $960. If entitled to recover drill pay and administrative duty pay during the period of his claim, there would be due him the sum of $2,291.33.

MEMORANDUM

Per Curiam: On the trial and submission of this case the principal issue raised was that the record failed to disclose that any orders were issued by the Major General Commandant of the Marine Corps or the Secretary of the Navy directing drill duties to be performed by the plaintiff's organization; in other words, that there were no competent orders for the drills which the plaintiff performed. In the former opinion, the court held that there were competent orders for such drills and the plaintiff was entitled to recover. The majority of the court is still of the opinion that competent orders were issued for the drills, but on motion for new trial for the first time the attention of the court was called to the provisions of Section 2 of the Act of January 19, 1929, 45 Stat. 1090, which provide that no compensation shall be paid for the performance of drills to members of the Naval Reserve or Marine Corps Reserve subsequent to July 1, 1925, "upon any claim unless such claim shall have been filed with the General Accounting Office within three years from the ex-

Per Curiam Memorandum

piration of the quarter in which the right to such payment accrued". This makes the filing of the claim a condition precedent to the payment thereof, and we have repeatedly held that where a statute requires certain conditions precedent to the allowance of a claim such conditions must be performed before relief can be granted by this court. See *King* v. *United States*, 48 C. Cls. 371, 375; *Goodman* v. *United States*, 52 C. Cls. 244; and *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205–206.

The plaintiff, however, contends that Congress did not intend to make the statute applicable to cases like the one at bar which arose after the passage of the act, and quotes from the Reports of the House and Senate on the act in question in support of this contention. It may be that the primary purpose of the act was to dispose of old claims and old records but the act itself has no such limitation. It is specific in form and includes all claims for compensation for the performance of drills "accruing to members of the Naval Reserve or Marine Corps Reserve subsequent to July 1, 1925". The proviso inserted in the act, "That no claim shall be debarred if submitted within one year from the date of the passage of this Act", was evidently included for the reason that a gross injustice would have been done if the act outlawed some of the older claims by imposing a condition with which the claimant could not possibly comply.

We think the statute manifestly was intended to apply to all claims of the nature of the one herein involved and as the petition failed to allege and the evidence did not show that the claim had been filed with the General Accounting Office within the time prescribed by the statute the action of plaintiff was thereby barred.

It follows that the motion for new trial must be sustained, the former opinion withdrawn, judgment thereunder set aside, and the petition dismissed. It is so ordered.

Syllabus

W. E. CALLAHAN CONSTRUCTION COMPANY AND PETERSON, SHIRLEY & GUNTHER v. THE UNITED STATES.

[No. 43175. Decided June 7, 1940. Defendant's motion for new trial overruled October 7, 1940]

On the Proofs

Government contract; decision of contracting officer limited to questions of fact.—The rule is well established that in contracts in which it is provided, as in the instant case, that the decision of the contracting officer and the department head shall be final and conclusive only as to questions of fact, a decision or ruling on a protest or appeal which involves or is based upon an interpretation and construction of a contract and the specifications is a decision on a question of law rather than the determination of a fact and does not preclude the consideration, decision, and determination by the court of the question in controversy, including the facts.

Same; changes involving increased costs.—Where contracting officer made and ordered a number of written changes in the original contract drawings, which also operated to change the specifications, and caused obvious increases in the costs of performing the work, and where in denying plaintiffs' protests, claims, and appeals. contracting officer gave no consideration to the factual phase concerning increased costs but assumed the right to order changes without regard to increased costs under the provision of paragraph 43 of the specifications, it is held that paragraph 43 of the specifications did not in any way limit or modify the provisions of article 3 of the contract in the instant case, which article required consideration and determination of increased costs resulting from such changes and an equitable adjustment on account thereof.

Same; time limitation waived.—Where contracting officer considered and decided on their merits protests by plaintiffs not made within time limit fixed by contract, it is held that such action on the part of contracting officer constituted a waiver of the time limitation provision.

Same; doubts resolved in favor of Government.—Where the contracting officer and the department head in construing the contract resolved all doubts in favor of the Government and against the plaintiffs, it is held that such manner and method of interpretation and construction were erroneous and unauthorized.

Syllabus

Same.—Where an instrument is drafted and prepared entirely by one of the parties thereto and is specific in its detailed requirements, subsequent doubts as to the meaning and applicability of the language and provisions thereof to definite facts, conditions situations, and circumstances, should not be interpreted and construed in favor of the party who drafted and prepared such instrument but, on the contrary, in such cases, the provisions of such instrument should, in case of doubt, be interpreted more favorably to the other party who did not and could not have anything to say as to the language and provisions of the instrument as prepared.

Same.—Where a contract, with its detailed drawings and specifications, was not the result of negotiations between the parties before execution, it is to be presumed that the party who prepared and wrote the contract, drawings, and specifications intended to express clearly his requirements in the language used rather than leaving them to be determined by resolving doubts and inferences in his favor.

Same; increased risks.—Where the contract provided that the plaintiffs, in constructing the "Madden Dam" across the Chagres River, Canal Zone, assumed risks involved in a possible flood in said river, it is held that under a proper construction of said contract the plaintiff's should be held to have assumed only the natural and expected consequences of such flood, and not additional and unusual damages from such flood caused by acts of the Government and its agents.

Same.—While no implied contract arises solely from a tort, where the Government by a written contract requires the contractor to assume a risk of loss or damage occasioned by the natural consequences of a specified cause, the Government reciprocally and impliedly assumes an obligation not to interfere in such a way as to increase the hazard of the risk so assumed.

Same; delay in instructions.—Where contracting officer failed to give instructions promptly, within a reasonable time, as to the use of certain material and the method of construction, and where such failure resulted in delay in the construction of the Left Ridge Dam, it is held that plaintiffs are entitled to recover.

Same; conflicting clauses.—Where there are two clauses in a contract in any respect conflicting, the clause which is specially directed to a particular matter controls in respect thereto over a clause which is general in its terms, although within its general terms the particular may be included.

Same; extra expense.—Where, by requiring plaintiffs to construct certain fills in the manner and of the materials indicated in certain change orders, the Government obtained better and more expensive dams than the contract contemplated or called for, it is held that plaintiffs are entitled to recover the reasonable and necessary extra expense established by the evidence.

Same; authority of Comptroller General.—Where the contracting officer and the department head agreed that plaintiffs were entitled to pay for extra rock excavation but the department head submitted the matter to the Comptroller General, who ruled that the contractor was not entitled to such extra pay, it is held that the contracting officer and not the Comptroller General had the authority, under the contract, to decide whether the plaintiffs were entitled in the circumstances to this extra pay.

Same; storage charges.—Where it was provided in the contract that the Government would furnish all the cement used in constructing the dam, and where by reason of failure of a shipment of cement to arrive on time it was necessary for the Government to supply cement from its stock in warehouse, it is held that the Government was not authorized nor entitled to make an extra charge for storage and the plaintiffs are entitled to recover such extra charge.

Same; duty of contracting officer; equitable adjustment.—Where the contract provided that the contracting officer might make changes in the drawings or specifications of the contract but that if such changes caused an increase or decrease in the cost or in the time required for performance an equitable adjustment should be made and the contract modified accordingly, it was the duty of the contracting officer, when the plaintiffs submitted proof that the changes resulted in extra work and expense, to make such equitable adjustment and to allow reasonable compensation; the construction of paragraph 43 of the specifications by the contracting officer and the department head ignored the requirements of articles 3, 5, and 15 of the contract.

The Reporter's statement of the case:

Mr. George R. Shields and *Mr. John M. Martin* for the plaintiffs. *King & King* and *Mr. Frank L. Martin, Jr.*, were on the brief.

Mr. William W. Scott, with whom was *The Assistant Attorney General*, for the defendant.

Plaintiffs sue to recover a total of $452,527.52 on 36 separate claims under a unit price contract, under which a total amount of $4,465,405.64 was paid upon completion of the work required by defendant thereunder. The claims here involved are for (1) damages, (2) extra costs by reason of written changes, and (3) failure to pay for certain work in accordance with the contract, specifications, and extra work orders.

The length of the findings and opinion is occasioned and made necessary by reason of the voluminous record, the nature and number of claims, the number of contract specifications involved, and the fact that each claim is distinct and requires separate findings and discussion.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiffs, a partnership for the purposes of the contract in suit, are W. E. Callahan Construction Company, a Nebraska corporation, and Peterson, Shirley & Gunther, a partnership composed of Edward Peterson, John P. Shirley, and Herman Gunther. On September 14, 1931, they entered into a contract with the United States, represented by the Governor of the Panama Canal as Contracting Officer, for the construction and completion, within 1,350 calendar days from date of notice to proceed, of what was and is known as Madden Dam, across the Chagres River, Canal Zone, Isthmus of Panama, with certain structures thereto appurtenant. The work was to be done on a unit price basis, estimated as aggregating $4,048,657, and in strict accordance with specific and definite plans and specifications attached to and constituting a part of the contract.

The contract, plans, and specifications are plaintiffs' exhibits A and B, respectively, and are made a part of this finding by reference.

2. During the progress of the work many change orders and extra work orders were issued— some added to the contract price and some reduced the contract price. The defendant always reduced the payment when there was a reduction in quantity. On March 16, 1936, plaintiffs received their final payment, making the total of all payments for the quantity of work performed, including additional payments made under certain extra work orders, the sum of $4,465,405.64. The thirty-six claims here involved arose under certain orders, changes, protests, and decisions, and each claim presented was reserved in the final release given upon receipt of final payment from the contracting officer.

Notice to proceed was given and received on October 5, 1931. Work was commenced October 13, 1931, and on

February 9, 1935, the work was completed and accepted, well in advance of the time agreed upon for such completion. Plaintiffs had the most modern plant and equipment which was kept in perfect condition, and an efficient organization.

3. The Governor of the Canal Zone, an army engineer, was the contracting officer and head of the department concerned. Although he had no particular experience in dam and powerhouse construction, he had the benefit of advice of engineers in the United States Reclamation Service who had wide experience in both dam and powerhouse construction. These engineers were largely the authors of the contract, plans, and specifications.

4. Under the Governor was the engineer of maintenance, also an army engineer, who was the authorized representative of the Governor on the work, and under written authority was the "contracting officer," for the purpose of change orders, extras, protests, and claims.

5. Under the engineer of maintenance was the construction engineer, a civilian engineer with about 20 years' experience chiefly in office work and some experience in inspecting and superintending construction work in the field. He was on the job continuously and gave directions as to lines and grades, made measurements of work for payments, issued orders and in the first instance ruled on disputes, and inspected all the work to determine whether it was done in accordance with the specifications as he interpreted them. Protests and claims were appealed from the construction engineer to the engineer of maintenance, as the contracting officer, and then to the Governor as the head of the department.

6. Madden Dam is across the Chagres River and about 25 miles from Panama City, Panama. The drainage basin of this river covers about 400 square miles, almost all of which consists of jungle land. On the Canal Zone, the dry season extends from January to June, and the wet season extends from June to January. These facts, together with tempera-

tures on the Zone and the occurrences and sizes of floods on the Chagres River, were all known to plaintiffs before the contract was signed.

CLAIM I. DAMAGE TO GRAVEL TRANSPORTATION SYSTEM

7. Paragraph 55 of the specifications provides, in part, that:

> The contractor shall assume all risk of damage to his plant, equipment, and operations at the gravel deposits, by reason of floods in the water courses adjacent to or through the gravel deposits.

In order to obtain an adequate supply of gravel to make the concrete necessary for the construction of Madden Dam, plaintiffs designed and constructed an automatic gravel transportation plant, electrically operated, consisting of buckets carried on cables attached to steel and wooden towers extending from a loading tower to the gravel screening plant. The screening plant was near the dam and the loading tower was 6,000 feet down the river. Three of these tramway towers near the loading plant were located on or near the river bank. These towers were so designed as to withstand the forces of high waters theretofore known in the Chagres River. The other towers were on a bluff near the river in direct line from the loading terminal to the screening plant.

On November 28, 1932, after this gravel transportation system had been in efficient operation for some time there occurred a flood on the Chagres River of very large proportions but not greater than other floods theretofore recorded.

8. After plaintiffs and the defendant had entered into the contract for construction of Madden Dam, but prior to the time of the flood, the defendant with its own forces and by contract with the J. A. Jones Construction Company was engaged cutting trees and clearing portions of the basin above the dam and, in so doing, had left a number of large logs and other debris in the basin, which large logs constituted a serious hazard to plaintiffs' plant equipment and

operations at Madden Dam beyond natural and contemplated flood hazards. The clearing contract required the contractor to burn the logs and debris occasioned by the clearing. In the flood of the river there was carried down from the clearing a considerable quantity of large logs, trees, and debris. The logs, trees, and debris thus carried down added to the otherwise natural hazards of the flood.

During the flood three towers of the gravel transportation tramway located on or near the bank of the river collapsed, breaking the cables and carrying away some of the conveyor buckets and greatly damaging the loading plant, causing plaintiffs much damage and expense. No witnesses saw the collapse of the towers. After the subsidence of the flood, trees, logs, and debris were found near and by the collapsed towers, about half of which came from the clearing. The plaintiffs proceeded to reconstruct the tramway which was completed on March 1, 1933. In the meantime, plaintiffs were put to considerable extra expense in transporting gravel to the dam site. The total extra cost so incurred, including cost of rebuilding the tramway towers that were destroyed, amounted to $36,802.98.

The flood of November 28, 1932, carried a number of large logs up to 6 and 8 feet in diameter and up to 80 feet in length from the defendant's clearing operations. These large logs struck and caused the collapse and destruction of the towers of the transportation system and the consequent damage thereto, and of the large cables and buckets. These towers as designed and constructed would have withstood, without injury or damage, the force and effect of the flood of November 28, 1932, together with any brush and debris carried by the flood other than the large logs and debris washed down against the towers from the defendant's clearing operations. The towers were so designed and constructed to withstand the natural effect and consequences of flood water greater than the flood occurring November 28, 1932. The foundation of each tower consisted of four concrete pedestals extending 6 feet into the ground, or the bed of the river at flood stage, and each pedestal was three or more feet in diameter. The towers constructed upon these

concrete bases were made of heavy timbers securely braced and bolted, and such towers were anchored and secured to the concrete foundations with long and heavy steel anchor rods, or bolts, securely embedded in the concrete and securely fastened and bolted to the base of the towers. The flood waters caused no appreciable scouring effect in the bed of the river or upon the foundations of the towers with which the flood waters came in contact. The timbers constituting the towers located within the flood waters were broken and torn apart to a considerable extent by the force of the large logs from defendant's clearing operations striking them during the flood. Some of these large logs having portions of large limbs projecting therefrom were, immediately after the flood, found entwined among the towers and large steel transportation cables.

The concrete piers or foundations of one tower in the path of the logs in flood waters were completely pulled out of the ground in the bed of the river and, with the tower and large logs, were carried some distance from their original location down the river where, after the flood had subsided, they were found near the destroyed towers, cables, and large logs. The steel rods, or bolts, with which the towers were anchored to the concrete foundations, were badly bent and twisted. Except for the large logs and other debris coming from the defendant's clearing operations along the river above the location of the towers, the force and effect of the flood and debris, other than that from defendant's clearing operations, would not have destroyed the towers or their concrete foundations.

CLAIM 2. EXTRA COSTS LEFT RIDGE AND OTHER FILLS FROM INTERFERENCE BY CONSTRUCTION ENGINEER

9. Some of the structures appurtenant to Madden Dam consisted of what were known as the "Left Ridge Dam" and certain "Saddle Dams," Nos. 8, 10, and 11. These structures, together with about a dozen other Saddle Dams, were necessary and were called for in the specifications because certain parts of the valley walls or ridges were not as high as the contemplated pool level of the dam, and it was there-

fore necessary to build up these walls or ridges to a height equal to or exceeding the height of the required pool level created by the Madden Dam structure. The Left Ridge Dam involved a very large amount of earth fill or embankment supplemented by an upstream concrete face and certain other concrete structures and rock filling. The contract drawings showed the nature of the material in the Left Ridge and Saddle Dams and the specifications specifically designated the material which plaintiffs could use therein as hereinafter more fully set forth. The Saddle Dams herein referred to by numbers also required large amounts of earth fill or embankment supplemented either by rock fills or gravel and, as to some, concrete core walls. The contract and specifications contemplated that the material for making these fills or embankments would be obtained largely from the excavations from Madden Dam proper. That is, as excavation went forward for the Madden Dam foundations, it was contemplated that the materials obtained therefrom would be transported to and used in building up the Left Ridge and the three Saddle Dam fills or embankments. Plaintiffs so planned their operations and so stated in their progress schedule furnished defendant in October 1931.

10. Throughout the year 1932 there was considerable disagreement between plaintiffs and the defendant as to the meaning and requirements of the contract and specifications with reference to the materials authorized to be used for the construction of Left Ridge Dam, chiefly as to the requirements and meaning of paragraph 74 of the specifications, hereinafter quoted. Because of the acts, rulings, and indecision of the defendant's authorized officers as to the construction of earth fills in the Left Ridge Dam, plaintiffs were unduly delayed and forced to change their plan. Plaintiffs insisted that the specifications permitted them to construct the Left Ridge Dam and Saddle Dam concurrently with the excavation of foundations from Madden Dam, transport the material as excavation from Madden Dam to Left Ridge Dam and Saddle Dam No. 8 and to place the same in the embankments without specially separating, sorting, blending, segregating, or otherwise mixing the material

with other materials, other than by excavated materials to be placed in the Left Kidge Dam against a vertical face with a power shovel or an equivalent method, which was the method used. The contracting officer and his authorized representatives insisted that it was within their discretion to decide as to the type of dam and as to the materials to be used in the Left Ridge Dam and as to the extent and manner of the blending thereof; and that they could prohibit the use of Madden Dam excavation material and require plaintiffs to obtain materials for construction of the embankments for Left Ridge Dam and Saddle Dam No. 8 consisting of certain material in specific portions in its natural state or by mixing various materials to obtain the desired proportion of clay without paying the plaintiffs any amount as additional compensation therefor.

11. Paragraph 69 of the specifications contains general directions on embankment construction. Paragraphs 74 to 77, inclusive, deal specifically and directly with the earth fills on Left Ridge Dam and the three Saddle Dams involved in this claim. Parts of these paragraphs read as follows:

> 69. *Embankment construction, general.*—For the purpose of these specifications, the term, "embankments," includes the earth and gravel fill portions and the rock fill portions of the Left Ridge Dam and of all saddle dams, the earth blankets and filling immediately upstream from the Madden and the Left Ridge dams, the dumped rock riprap on the upstream slopes of saddle dams Nos. 8 and 5, the gravel blankets under the dumped riprap, and the embankments or fills for the highways, and does not include any works constructed by the contractor for his use in the performance of the contract. Embankments shall be constructed to the lines and grades established by the contracting officer, which, in general, will be the lines and grades shown on the drawings increased by such heights and widths as determined necessary by the contracting officer to allow for later settlement. * * * The suitability of all materials for construction of embankments shall be subject to the approval of the contracting officer. * * * It should be feasible to transport a large portion of the materials, which are excavated for other required parts of the work, and which are suitable for embankment construction, direct to the embankments

at the time of making the excavations. However, the contractor shall be entitled to no additional compensation above the prices bid for excavation and embankments by reason of it being necessary or required, on any account, that such excavated materials be deposited in spoil banks prior to transporting to the embankments.

There were many other "embankments" in addition to these dams.

74. *Earth fill in Left Ridge Dam.*—The earth fill portion of the Left Ridge Dam shall consist of the natural mixture of clay, silt, sand, and gravel available from the foundation excavation for the Madden Dam, from borrow pit CR-2, or from other approved borrow pits. Separation, sorting, blending, or segregation of the materials will be required only to the extent that, in the case of power shovel or equivalent methods of excavation, the embankment materials shall be mixed and blended by the usual process of excavating against a vertical face and, in the case of team or equivalent methods of excavation, the loading shall be carried on simultaneously in different parts of the excavation yielding different kinds of materials, and that, regardless of the methods of excavation, the dumping of the successive loads from the different parts of the borrow pits or required excavation shall be in locations on the embankment as directed or approved by the contracting officer. * * *

75. *Earth fill in Saddle Dam No. 8.*—The earth fill portion of Saddle Dam No. 8, including the fill in the cut-off trench on each side of the core wall, shall consist of the natural mixture of clay, silt, sand, and gravel available from the foundation excavation for the Madden Dam, from borrow pit CR-1, or from other approved borrow pits. * * *

77. *Earth fills in other saddle dams.*—The earth fill portions, including the cut-off trenches, of Saddle Dams Nos. 10 and 11 shall consist of the natural mixture of clay, silt, sand, and gravel available from borrow pit CR-1, or from foundation excavation for the Madden Dam, *if suitable, as determined by the Contracting officer*, or from other approved borrow pits. * * * [Italics ours.]

12. October 23, 1931, plaintiffs submitted to the defendant their construction schedule which showed that plaintiffs

contemplated making fills on Left Ridge Dam and Saddle Dams during the dry season of 1932, while the 1932 Madden Dam excavation was in progress except on Saddle Dams 8, 10, and 11, the fills for which were to be made while 1933 Madden Dam excavation was in progress. Plaintiffs did construct all the earth dams during the dry season of 1932, which included the months of January to June, inclusive, of each year, except those dams involved in this item of the claim.

Plaintiffs did not follow out their construction schedule as to Left Ridge Dam because they were prevented from doing so by the acts and decisions of the contracting officer and his authorized representatives. In accordance with their construction schedule, plaintiffs commenced the construction of the road for the transportation of material from Madden Dam foundation to the Left Ridge Dam on December 11, 1931, and the stripping of the Left Ridge Dam of the top soil, rubbish, stone, etc., as required by paragraph 60 of the specifications was commenced on December 17, 1931. The road for the transportation of such material was ready for use February 1, 1932. A portion of the drilling and grouting and a portion of the cut-off wall in Left Ridge were completed early in February 1932. A portion of the foundations for the Left Ridge Dam fill had been stripped by plaintiffs by that time. The stripping, as called for and as required by the original specifications, was completed April 20, 1932. On February 3, 1932, plaintiffs commenced the excavation of Madden Dam foundations and were then ready and prepared to transport the materials from the excavation of the Madden Dam foundations, as excavated, direct to Left Ridge Dam and to place them thereon as provided for and authorized in the original plans and specifications in the portion of the Left Ridge Dam on which the preliminary work of stripping had been completed in accordance with the original plans and specifications. However, plaintiffs were not permitted by the contracting officer to do this for the reason that he and his authorized engineers concluded that the materials from Madden Dam foundations were not suitable without mixing with other materials because they thought that Mad-

den Dam materials were too porous for purposes of Left Ridge Dam fill, and that a portion of that fill, particularly the upstream portion thereof, should be constructed of impervious materials containing a considerable quantity (at least 20%) of clay, of which there was very little in the Madden Dam common excavation. The borings and original contract drawings showed practically no clay in Madden Dam foundations or in the indicated fill for Left Ridge Dam.

The contracting officer and his authorized representatives were also undecided early in 1932 and until September of that year as to how they wanted Left Ridge Dam and Saddle Dam No. 8 constructed, and they were constantly experimenting and making tests of materials; for these reasons plaintiffs were thereupon required to waste the materials excavated from Madden Dam foundations in "permanent waste dumps," near Left Ridge Dam as designated by the contracting officer's authorized representative. At that time, early in 1932, the contracting officer and his authorized engineers were preventing plaintiffs from using any of the Madden Dam excavation for the Left Ridge Dam fill because they had concluded that the material was not such as could be permitted to be used for this purpose under paragraph 74 of the specifications—to all of which plaintiffs duly protested. In wasting the materials excavated from the Madden Dam foundations it was necessary for plaintiffs to haul them over the same road which they had constructed over which to haul them to Left Ridge Dam. Later the defendant's authorized contracting officer decided that the foundations of these earth dams should be stripped to rock, which was at a maximum depth of 6 feet below the original ground surface, the crevasses therein cleaned out by hand and filled with a mixture of clay and gravel tamped in by hand. An extra work order was later issued in September 1932 for this work. This work could and would have been performed early in 1932 if the contracting officer had decided earlier what he desired in that regard.

In October 1932 the contracting officer had a board of consulting engineers from the United States Reclamation

Bureau come to the site of the work to inspect it and make a report. Thereafter, on January 3, 1932, the contracting officer issued revised plans and specifications for the making of these embankments, and the dams were thereafter constructed in accordance with these changed plans and specifications. Plaintiffs commenced the earth fill in Left Ridge Dam in December 1932 and completed it in April 1933. The earth fills in Saddle Dams Nos. 8, 10, and 11 were placed during the months of December 1932 and January, February, and March, 1933.

13. The excavation for Madden Dam foundations began February 3, 1932, and continued to April 1933. During the dry season of 1932 the excavation from Madden Dam continued, and much of the excavation therefrom was deposited in the "permanent waste dumps" designated by defendant. Practically all this material could have been used in Left Ridge Dam without rehandling had the defendant permitted plaintiffs to construct this earth dam as originally designed and in accordance with the original plans and specifications therefor, or, if the defendant, as it was obligated to do, had decided early in 1932, when this work was ready to be performed by plaintiffs, what changes it desired to make in the preparation of the foundation for this fill. Instead, the defendant prevented the use of this material and required it to be wasted in permanent waste banks as excavated with no thought at that time of ever permitting it to be used in any of these earth fills. The defendant required extra work to be performed in preparing the foundations in Left Ridge Dam before permitting plaintiffs to place any material in the embankment. But the final decision as to how the embankments for Left Ridge Dam and Saddle Dam No. 8 were to be constructed was not made by the defendant until January 3, 1933, when the revised plans and specifications therefor were issued. The materials for the fills in the Left Ridge Dam and Saddle Dam No. 8 were obtained and placed during the dry season of 1933 from approved borrow pits and the waste banks into which the defendant had theretofore required plaintiffs to waste certain Madden Dam common excavation.

14. Plaintiffs performed the work covering contract items 5, 17, 18, and 20, namely—common excavation for Madden Dam, earth fill in Left Ridge Dam, earth fill in Saddle Dam No. 8, and earth fill in Saddle Dams Nos. 10 and 11, at a cost of $333,815.22. If plaintiffs had been permitted by the defendant to perform this work during the year 1932 in accordance with the original plans and specifications as contemplated, and as plaintiffs could have done, instead of being delayed until 1933 and required to perform the work in accordance with the revised or changed plans and specifications, plaintiffs could and would have performed the work at a cost of $152,061.69 less than what the work actually cost them. If plaintiffs are held entitled to recover this additional expense and also reasonable overhead and a profit of 10 percent, the reasonable overhead expense would be $4,120.87 and a 10 percent profit would be $15,618.26.

15. The actions, rulings, instructions, directions, and decisions of the contracting officer, in delaying the construction of Left Ridge Dam by unreasonably delaying his decision as to the additional preparatory work of cleaning the crevasses by hand and hand-tamping special material therein; in delaying for a period of nine months the issuance of revised and changed plans and specifications for the construction of the embankment and requiring plaintiffs to obtain special materials with 20% of clay and then specially mix them for construction of the embankment; in requiring the plaintiffs permanently to waste the Madden Dam excavation materials while such excavation was being performed and then later permitting the use of such materials which required reexcavating and rehandling such materials, all of which resulted in increased and unnecessary costs to plaintiffs, were unreasonable, without an equitable adjustment, and contrary to the contract and original plans and specifications upon which plaintiffs based and made their bid for this particular part of the work.

CLAIM 3. SPILLWAY APRON EXTENSION

16. In the early part of the year 1932, defendant decided to construct a 30-foot extension of the spillway apron and

the training wall of the main dam. This was discussed with plaintiffs and on April 13, 1932, the construction engineer forwarded to plaintiffs revised plans and a written change order showing these extensions.

After some exchange of correspondence in which plaintiffs asked for a written change order under article 3 for these extensions and defendant had advised plaintiffs that the revised plans and the contracting officer's letter accompanying the same constituted the change order, plaintiffs, on June 7, 1932, wrote a letter asking what prices would apply to the additional work on the extensions.

On June 9, 1932, the construction engineer, as the authorized representative of the contracting officer, wrote plaintiffs as follows:

> The unit prices which apply to the spillway apron, training walls, cut-off walls, concrete gutter pipe, reinforcing steel, etc., are clearly stated in the specifications and schedule, and it is not within my authority to change them. However, if you refer to the added quantities in your favor which are caused by this change of extending the apron 30 foot downstream, please refer to paragraph 43 of the specifications which states that the Contractor shall be entitled to no extra compensation because of such changes, except that an increase thereby in the amount of excavation, concrete, or other work required will be paid for at the unit price bid in the schedule.

On June 11, 1932, plaintiffs made written protest to the contracting officer on the ground that the spillway apron extension was not such a reasonable change as would come within paragraph 43. This was followed by the submission by plaintiffs to the defendant of data and reasons in support of their protest.

On February 20, 1933, the contracting officer wrote plaintiffs stating that in his opinion the change was reasonable and was covered by paragraph 43. For that reason he denied plaintiffs' claim for any additional compensation. The contracting officer made no determination of facts but based his decision on his construction of paragraph 43 of the specifications. No appeal was taken from this ruling to the head of the department.

Reporter's Statement of the Case

Throughout the controversy plaintiffs contended that the spillway apron extension was not a reasonable change within the meaning of and covered by paragraph 43 of the specifications, and that it should be classed as extra work under article 3 of the contract and paragraph 3 of the specifications.

17. As a means for the performance of the work for the building of Madden Dam and appurtenant structures specified and called for by the specifications, plaintiffs erected an electrically operated cableway extending from a head tower on the left bank to a like tail tower on the right bank, which towers were on runway tracks so that they could be moved up or down stream to permit access of the cableway to all parts of the work as originally designed and called for. The plant was not designed to reach beyond the limits of the work as originally planned and specified. The concrete for the apron extension required a second handling by derricks or by cableway buckets. The change did not add materially to plaintiffs' outlay for equipment.

Plaintiffs claimed then and now that the extra costs to them because of the change in excess of the costs for similar work in the original apron are as follows:

(a) Concrete in apron extension, at $10, under an outstanding "Extra Work Order" 14	$33, 762. 75
(b) Cut-off trench, at $10 a cubic yard	1, 372. 67
(c) Training walls	4, 484. 10
(d) Apron concrete	101. 07
(e) Enlarged Coffer Dam, including profit	15, 480. 73
(f) Diversion wall vs. training wall	1, 081. 97
(g) Flood damage, otherwise avoided	17, 340. 81
(h) Increased pumping costs	1, 609. 89
Total	75, 233. 99

The unit price for concrete in Madden Dam and the original spillway apron was $2.50 a cubic yard and plaintiffs were paid at this rate for all of the concrete placed in the apron extension. Plaintiffs claim under item (a) above that they were entitled to pay under extra work order made item 111 at the rate of $10 a cubic yard on the ground that under change order No. 14 they were paid that rate for the placing of concrete in certain low spaces west of the spillway

apron as extended immediately downstream from the apron extension. These two pieces of work were not the same and had several elements of difference. If extra contract item 111 is determined to be the proper unit price, then plaintiffs are entitled to the sum claimed in this item.

On items (e) and (g) above, the extra costs are as claimed by plaintiffs, but defendant held and here contends that paragraph 56 of the specifications precludes any allowance on account of these two items. The basis of plaintiffs' claim is that if the extension had not been ordered, the spillway apron as originally designed would have been completed by October 29, 1932, and this damage from the flood avoided. However, if this work had been completed on this date, other work would likely have been started to which there would have been damage, the extent of which cannot be determined.

Excluding items (a), (e), and (g) the extra costs were as shown and amount to $8,649.70.

CLAIM 4. HIGHWAY FILL TO SADDLE DAM NO. 8

18. The contract called for and plaintiffs constructed a highway on the right side of the river from Madden Dam to Saddle Dam No. 8 which required the making of fills. The issue on this claim involves chiefly the interpretation of paragraph 78 of the specifications. This paragraph is in part as follows:

> 78. *Earth fills for highways.*—The earth fills for both the main and branch highways, where these are not located on dams, shall be constructed from required excavation for the highways, where the excavated materials are suitable: *Provided*, That the contractor will not be required to use such excavated material when it is located on the opposite side of the river from the fill being constructed. Due to the disintegrating tendencies of the rock, in the excavation for the highways and in other required excavation in the vicinity of the highways, no highway fill shall contain any of this rock in an amount in excess of 35 per cent of the total volume of materials in the fill unless otherwise directed by the contracting officer. Such rock shall be uniformly distributed throughout the fills: *Provided*, That no rocks, the maximum dimensions of which are in excess

> of 6 inches, shall be placed within 18 inches from the tops of fills. If there is not sufficient suitable materials available from required excavation for the highways, additional materials shall be secured from other required excavation or from borrow pits approved by the contracting officer. Except as otherwise provided for materials on the opposite side of the river, the contractor shall move all required materials to the highway fills regardless of the length of haul.
>
> * * * * *
>
> The cost of constructing the earth fills, including all hauling of materials regardless of length of haul, and doing all work described in this paragraph shall be included in the unit prices per cubic yard bid in the schedule for excavation for highways or for other required excavation: *Provided*, That payment for excavating the materials used in these fills from approved borrow pits, if such materials are required, as determined by the contracting officer, will be made at the unit price per cubic yard bid in the schedule for common excavation for highways, in which case the materials will be measured for payment in excavation in the borrow pits.

On August 17, 1932, plaintiffs wrote the construction engineer proposing to make this highway fill with required excavation from Madden Dam. Nothing was said in this letter about extra payment for making this fill. This would not have required borrow pit excavation or transportation of material across the river. August 19, 1932, the construction engineer wrote plaintiffs agreeing to the proposal.

The parties are agreed that under the specifications for fills for dams made with additional excavation the plaintiffs were to be paid both for excavation and for fills. That for highway fills made with required excavation the plaintiffs were to be paid only for excavation.

19. In the forepart of April 1933, plaintiffs called on the construction engineer in regard to extra payment at $1.50 a cubic yard for this highway fill by reason of the necessity of securing and using materials therefor from borrow pit CR-2 located on the other side of the river. No agreement was reached. The construction engineer by letter of April 13, 1933, advised plaintiffs that under paragraph 78 *supra* they were not entitled to any pay by reason of the

necessity of obtaining such material. This controversy by letter of June 17, 1933, was appealed to the head of the department, who, on July 12, 1933, wrote plaintiffs denying claim for pay and for excavating and placing this material on the ground that they were not entitled under paragraph 78 to payment therefor.

20. The plaintiffs had originally planned to use required excavation from Madden Dam on this highway fill and to begin the work thereon the latter part of August 1932. For some reason not apparent on the record, the work was not carried on as planned and the highway fill was not made until the Spring of 1933. At the time the fill was made practically all required excavation in Madden Dam had been completed and all available material therefrom had been used elsewhere or permanently wasted under the circumstances stated under Claim 2. There was no suitable fill material available on the side of the river where this highway was located. Plaintiffs were required to and did obtain the material for this highway fill from borrow pit CR-2 and the Madden Dam waste dump both on the opposite side of the river. To reach the highway fill with the material from those two sources of supply plaintiffs had to build a bridge across the river.

Plaintiffs claimed payment for making this highway fill under contract item 11, "common excavation for highways," at the rate of $1.50 a cubic yard. The number of cubic yards transported across the river from borrow pit CR-2 was 7,432.1, and from the waste pile, 4,353; or a total of 11,785.1 cubic yards. Plaintiffs here ask for payment in one of three alternatives, as follows: (a) If entitled to be paid for 11,785.1 cubic yards at $1.50 a cubic yard, there would be due to plaintiffs the sum of $17,677.65. (b) If it was permissible for the plaintiffs, though not in fact done, to make 35% of the highway fill from rock excavation from the highway cut and for rock excavation so used, plaintiffs would have been entitled only to the excavation price. If entitled to be paid for 65% of the fill required and placed, the amount due plaintiffs would be (65% of 11,785.1 cubic yards at $1.50 a cubic yard) $11,490.48. (c) If plaintiffs are not entitled to payment for any of the material that

went into the fill from the Madden Dam waste pile but are entitled to payment for material obtained from borrow pit CR–2, then the amount due plaintiffs would be (7,432.1 cubic yards at $1.50 a cubic yard) $11,148.15.

CLAIM 5, CUT-OFF TRENCH, MADDEN DAM

21. This claim involves the interpretation of paragraphs 29 and 65 of the contract specifications, the pertinent parts of which are as follows:

> Paragraph 29. *Description of Madden Dam.*—* * * Excavation for the base of the dam will be carried well into solid rock, and a cut-off trench will be excavated below the upstream heel. * * *
>
> Paragraph 65. *Excavation of Madden Dam cut-off trenches.*—Cut-off trenches shall be excavated under the upstream toe of the Madden Dam, the upstream edge of the upstream concrete aprons, under the downstream edge of the spillway apron, and under the downstream edge of the tailrace floor. * * * Excavation of the cut-off trenches covered by this paragraph will be measured for payment to the actual excavated lines, as approved by the contracting officer, below the general level of the adjacent completed excavated surfaces, and payment therefor will be made at the unit price bid in the schedule for rock excavation of cut-off trenches for Madden Dam.

The unit price for rock excavation for Madden Dam under contract item 6 was $3.10 a cubic yard; and the unit price for "rock excavation of cut-off trenches" under contract item 7 was $10 a cubic yard.

Contract drawing 5137–57 showed two cut-off trenches. One trench was between the completed excavated surface for the upstream apron and the completed excavated surface for the Madden Dam foundation. The surface of the former as approved by the contracting officer was, in most cases, higher than the surface of the latter. The other trench was between the completed excavated surface for the spillway apron extension and a completed excavated surface for a concrete apron below the spillway. The latter surface as so approved was, in most cases, higher than the surface of the former.

Rock excavation from Madden Dam and aprons was completed before the rock excavation for the cut-off trenches

was begun. The surface rock was blasted and removed with a shovel. The contract contemplated rock excavation in the trenches would be performed, and it was done with a pavement breaker and the rock removed by hand. The rock excavation in the trenches was more difficult and expensive than the surface rock excavation.

22. Plaintiffs and defendant differed on the method of measurement to be used for the purpose of payment for the necessary rock excavation for the cut-off trenches. The difference is clearly shown on sheet 5 of plaintiffs' exhibit 5–A, which sheet is made a part hereof by reference. Defendant measured for payment by drawing a horizontal line from the lower of the two surfaces to the other side of the trench and the rock excavated below this line was paid for at the rate of $10 a cubic yard. The rock which was necessary to be and which was excavated by hand within a triangle formed by drawing a horizontal line from the lower surface to the opposite side of the trench, thence a line from this point to the higher surface, and thence a line from this latter point to the point of the beginning of the horizontal line, was paid for at the rate of $3.10 a cubic yard, under unit work item 6 "Rock excavation for Madden Dam." The rock within this triangle was required to be and was excavated in the same way as the rock below the horizontal line but plaintiffs' claim for payment for the necessary rock excavation within the triangle at the rate of $10 a cubic yard was denied by the contracting officer and the head of the department upon their construction of paragraph 65, *supra*. The amount of rock removed within the triangle above the horizontal line was 3,133 cubic yards, about which there is no dispute, for which plaintiffs claim additional payment for the difference, that is, $6.90 a cubic yard, amounting to $21,617.70.

CLAIM 6. SLOPE PAYMENT, COMMON EXCAVATION

23. The pertinent parts of paragraph 62 of the specifications provide as follows:

> *Excavation, general.*—Except as otherwise provided for definite features of excavation in these specifications or shown on the drawings, excavation will be measured

> for payment to slopes of 1 to 1 for common excavation and ¼ to 1 for rock excavation, and in the case of excavation for structures, to lateral dimensions 1 foot outside of the foundations of the structure: * * * *And provided further*, That for any structure or open cut where, in the opinion of the contracting officer, the conditions warrant, the excavation will be measured for payment to the most practicable dimensions and lines as staked out or otherwise established by the contracting officer. * * *

This claim is the result of certain common excavation for Madden Dam between the lines as paid for by the contracting officer as the limits of the excavation, namely, lines based on a 1-foot berm and a 1-to-1 slope, as compared to payment claimed by plaintiffs on the basis of necessary excavation to a practicable berm of 10 feet and slope of 2-to-1 at the extremities of the same excavation.

The materials encountered in Madden Dam excavation, involved in this claim, would not stand on a slope of 1 to 1 and required a minimum slope of 2 to 1. Under the circumstances, a 1-to-1 slope was an impractical slope and a 2-to-1 slope was practical. A 1-foot berm was impractical. A 10-foot berm was practical and necessary to avoid cave-ins and danger to workmen, and permit reasonable progress of the work.

The material encountered could only be made to stand on a 2-to-1 slope. The material would not stand on a 1-to-1 slope, and it would have been dangerous to work under such a slope. Such a slope would have resulted in slides, would have endangered the lives of the workmen, and would have retarded the work. The necessary excavation work was performed by plaintiffs on the basis of a 10-foot berm and a 2-to-1 slope.

24. Plaintiffs endeavored to have the construction engineer establish as a practical slope and berm, a 2-to-1 slope and a 10-foot berm and to make payment on that basis. The construction engineer refused to do so on the sole ground that paragraph 62, *supra*, of the specifications was a direction to him that the excavation was to be measured for payment on the basis of 1-to-1 slope and a 1-foot berm.

This ruling of the construction engineer was appealed to the engineer of maintenance, as the contracting officer, who on April 6, 1933, wrote plaintiffs, as follows:

> It is the apparent intent of this paragraph [62] to fix in advance a slope for payment for common excavation at 1 to 1. There was no idea involved that the actual slopes would be found to be 1 to 1. Therefore, bidders should have made their own estimates as to what the slopes would be in figuring the costs for the work. No unusual or extraordinary conditions were found in the excavation of Madden Dam which could not and should not have been foreseen by bidders.

On May 5, 1933, plaintiffs appealed to the head of the department, as follows:

> We respectfully protest the Engineer of Maintenance's letter of April 6 in answer to our letter of March 17, because the nature of the material warrants excavation to lines requested, in our letter of March 17, for proper protection of workmen and the work and because, in our opinion, it is the apparent intention of Paragraph 62 to allow the Contractor payment for all excavation made to the most practicable dimensions. These specifications do not limit the change of slope to extraordinary and unforeseen conditions.

On June 5, 1933, the head of the department denied plaintiffs' appeal and affirmed the rulings of the construction engineer and the contracting officer.

The refusal of the construction engineer, the contracting officer, and the head of the department to fix a practicable slope instead of holding plaintiffs to the 1-to-1 slope used, involved no decision on a question of fact but their decisions were based on their interpretation of the specifications.

25. The amount of the material removed in this excavation on the practical basis of a 10-foot berm and a 2-to-1 slope in excess of the material within a 1-foot berm and a 1-to-1 slope was 17,330.37 cubic yards of additional common excavation. The original contract drawings for Madden Dam showed a berm of about 23 feet and a slope of 3 to 1 for the downstream excavation pay line measurements. When this drawing was changed and revised by the contracting officer to include the spillway apron extension

the revised drawings showed a like berm of 23 feet and a slope of 3 to 1. Later, the contracting officer revised and changed this latter drawing to show a berm and slope to a 1-foot berm and a 1-to-1 slope. In his decision on plaintiffs' protest and claim under this item, the contracting officer and the head of the department declined and refused to give any consideration whatsoever to the matter of what was a practical slope or a practical berm for the common excavation hereinbefore mentioned, and held simply that paragraph 62 of the specifications, *supra*, compel him to pay only on the basis of a 1-foot berm and a 1-to-1 slope for common excavation. If plaintiffs are entitled to be paid for this additional excavation at the contract unit price of $1.50 a cubic yard on the basis of conditions which required practical dimensions of a 10-foot berm and a slope of 2 to 1, the amount to which plaintiffs are entitled is $25,995.56.

CLAIM 7. CHARGE MADE BY DEFENDANT FOR CEMENT ALLEGED TO HAVE BEEN WASTED

26. Paragraph 40 of the specifications provided that the Government would furnish the cement for use in concrete, plaster, and grout, the same to be hauled to the work and stored by the contractor in a manner "satisfactory to the contracting officer" and that the contractor "will be charged for any materials lost or damaged after delivery, except as otherwise specifically provided, the same amount that the materials cost the Government at the point of delivery to the contractor."

The parts of paragraph 101 of the specifications pertinent to this claim are as follows:

> *Cement.*—Portland cement for the concrete, grout, and plaster will be furnished to the contractor by the Government, as provided in paragraph 40. * * * The contractor shall give the contracting officer not less than ninety (90) days' notice in writing of his cement requirements. The requirements shall be stated, insofar as practicable, in quantities of not less than carload lots, but the Government reserves the right to deliver requirements for two (2) weeks in one shipment. Any cement damaged or wasted by the contractor *due to*

> *carelessness* in unloading and storing or otherwise will be charged to the contractor at its entire *cost* to the Government at the point of delivery to the contractor. [Italics supplied.]

Up to September 1, 1933, plaintiffs were charged for cement alleged to have been wasted, to which they duly protested. After that date, on request of plaintiffs, the items of wastage of cement were not charged monthly but were left for adjustment until the final settlement of the contract. The amount of the bills for wastage of cement up to September 1, 1933, was $3,660.29 for 1,474.895 barrels of cement. The amount of the bills for the wastage of cement after September 1 was $1,240.78 for 449.4 barrels of cement, which was deducted at the time of the final payment under the contract, and to which deduction plaintiffs duly protested. These two amounts constitute the basis of this claim of $4,901.07 for 1,924.295 barrels of cement.

27. There was no waste of cement before it became a part of the concrete. The cement wasted was in the concrete that could not be used for various causes. Plaintiffs' employees were carefully supervised by competent foremen. The defendant had competent inspectors, one at the mixing plant and one where the concrete was being placed. The proportioning and mixing were done under the supervision and direction of defendant's inspector at the plant, and the concrete was placed under the supervision of the inspector at the site of the work. These inspectors were under a competent and experienced engineer in charge of all concrete work for defendant. The following appear to be the main causes of waste as shown by the record:

(1) Sudden and heavy rains while the concrete was en route from the mixing plant to the forms.

(2) Over orders of concrete from the placing inspector to the mixing inspector.

(3) Faulty proportioning at the mixing plant, not due to carelessness of plaintiffs.

(4) Temporary disorders in or mishaps to equipment, not due to carelessness.

(5) Slow placing of concrete because of some happenings in the forms, not due to carelessness.

On a project of this kind and magnitude some wastage of cement is unavoidable and the normal waste of cement is from ¾% to 1½% of the total cement used. The waste of cement charged against plaintiffs was $\frac{3}{10}$% of the total cement used. The waste of cement for which defendant made a charge of $4,901.07 against plaintiffs was not caused by plaintiffs' carelessness, and was less than the normal and expected wastage.

The cement in bags of 94 pounds each was delivered by the defendant to plaintiffs at Madden Dam Siding about 12 miles from Madden Dam. The defendant bought and paid for a total of 624,861.75 barrels of cement. The defendant charged plaintiffs for using 627,345.74 barrels of cement, or 2,483.99 barrels of cement in excess of the total amount of cement which the defendant had bought and *paid for*. The difference came about by reason of the fact that the manufacturer from whom the defendant purchased 624,861.75 barrels, placed a pound or two extra in each bag without charge so as to make certain that no bags would be found underweight. The amount of cement for which defendant made a charge of $4,901.07 against plaintiffs as for wastage, cost the defendant nothing. The decisions of the contracting officer and the head of the department that plaintiffs were, under the provisions of paragraph 101, *supra*, subject to a charge for the amount wasted and that the wastage of $\frac{3}{10}$% could have been avoided by the exercise of proper care were arbitrary and so grossly erroneous as to imply bad faith.

CLAIM 8. CONCRETE IN MADDEN DAM TEST PITS

28. This claim involves the interpretation of extra work or change order 2 under an agreement between the parties as to what plaintiffs should be paid a cubic yard for concrete placed in test pits excavated in the foundation of Madden Dam below the depths to which the common excavation had been carried. In the end defendant paid plaintiffs only $2.50 a cubic yard under contract item 48, "concrete in Madden Dam." Plaintiffs duly protested and insisted that they were entitled, under the agreement as a result of which

extra work or change order No. 2 was made, to be paid under such extra work order dated January 13, 1933, and made contract item 97. This extra work order is plaintiffs' exhibit 8, sheet 2 (made a part hereof by reference), and fixed the unit price "for concrete filling in open pits, wells, etc., at $7.50 a cubic yard." The first two lines of the last paragraph of this work order, which lines related only to the filling of the test pit in the counterforted wall, read as follows: "The estimated quantity of work involved in this extra work order is 104 cubic yards in an exploration pit, which is partly beneath the counterforted wall." The content of the test pits for which plaintiffs claim payment under the order was about 2½ times that of the exploration pit just referred to.

29. The test pit under the counterforted wall had been excavated as an extra work item. On March 3, 1933, extra work order 11 was issued, made contract item 108, for the excavation of like test pits in the foundation of Madden Dam at the unit price of $10 a cubic yard. This work order is plaintiff's exhibit 8, sheet 11, and is made a part hereof by reference. The test pits were from 10 to 12 feet deep and from 4 to 6 feet square. The work of placing concrete in these pits was the same as the work necessary in placing concrete in the exploration pit for the counterforted wall referred to above. The concrete was placed in the pits at the beginning of the general pour of concrete and required somewhat more care and time and was more expensive than the general pour in Madden Dam. Before the pour of concrete began, the pits had to be unwatered and cleaned and the time and labor involved in unwatering and cleaning made the cost of placing concrete in the pits considerably higher than the ordinary pour of concrete in Madden Dam.

30. Plaintiffs claimed in writing that they should have been paid for placing concrete in these test pits at the unit price of $7.50 as provided for in extra work order No. 2 and requested such payment from the construction engineer who held that payment for such concrete, which was required to be and was placed for filling test pits, was properly made under contract item 48 at the unit price of $2.50

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a cubic yard. When time for payment arrived this officer construed the extra work order No. 2 as having no relation to the price to be paid for filling test pits in Madden Dam foundations which had been excavated under extra work order No. 11. This controversy was carried by plaintiffs to the engineer of maintenance who confirmed the decision of the construction engineer. Afterwards plaintiffs appealed to the Governor who also held that the concrete in the test pits should be paid for at the same rate as Madden Dam concrete at the unit price of $2.50 a cubic yard.

The construction engineer and the Governor interpreted paragraph 63 of the specifications to provide that payment for unwatering and cleaning of all excavations and the preparation of rock for the placing of concrete was included in the price paid for excavation. But these test pits were extra work not contemplated by the specifications.

31. This extra work order No. 2 directed plaintiffs "to place concrete filling, in open pits, test wells, and other depressions where required and directed by the contracting officer, and where the concrete is not of a class or in any situation governed by any other concrete item in the schedule" in article 1 of the contract. When this extra work order, which arose because of the unit price of $20 a cubic yard specified for concrete in the counterforted wall, was under consideration and when it was made, plaintiffs waived their right, which everyone agreed they had under the contract, to be paid for filling the test pit under the counterforted wall as counterforted concrete at $20 a cubic yard. They accepted the change reducing the price to $7.50 a cubic yard under the extra work order with the understanding that there was thereby being established a fair price for the placing of concrete in other exactly similar test pits under other parts of the work. They specifically so stated to the contracting officer when they agreed to the defendant's proposal to issue a change order reducing the contract price for the counterforted wall pit from $20 to $7.50. There was no other consideration for the change in price, and otherwise plaintiffs would not have agreed to it.

32. If entitled to be paid for concrete placed in the test pits at the rate fixed by extra work order No. 2, contract

item 97, at $7.50 a cubic yard instead of as paid at $2.50 a cubic yard as for Madden Dam concrete, contract item 48, then there is due plaintiffs a balance of $1,284.

CLAIM 9. EXTRA ROCK EXCAVATION

33. The work of rock excavation for Madden Dam was to be performed as specifically directed under paragraphs 62–65 of the specifications. After plaintiffs had excavated blocks 1, 2, and 3, located beside and into the right abutment, and had trimmed the same to lines and grades as directed, and had begun the placing of concrete in the lower part of said blocks, unforeseen conditions developed in that the adjacent right walls of rock against which the concrete was to be placed showed a tendency to crack and slide. Plaintiffs notified the defendant of this condition, and the defendant after investigation and study gave plaintiffs detailed instructions for doing further rock excavation by hand from the right abutment in order to correct the defects.

Blasting was prohibited on the extra work for excavating the rock so ordered and done. The excavation of this rock required the use of pavement breakers and other special equipment, which was more expensive to excavate than rock excavation under contract item No. 6 at $3.10 a cubic yard.

34. Plaintiffs claimed payment for this extra rock excavation under contract item No. 7 at the unit price of $10 a cubic yard and asked for such an extra work order on the ground that this rock excavation was similar to and required the same work and care as rock excavation of cut-off trenches. This excavation was in fact similar to that of trench excavation.

On October 23, 1933, the Governor wrote plaintiffs, plaintiffs' exhibit 9, sheet 15, which is made a part hereof by reference, holding that plaintiffs were not entitled to be paid under contract item No. 7, but stating further that:

> However, in view of the fact that this rock developed peculiar and unforeseen characteristics which apparently caused you extra expense due to restrictions on method of excavation which you might reasonably have

> expected to use, I am willing to submit the matter to the Comptroller General for decision, based on the extra cost which you have incurred.

Further, in this letter the Governor suggested that plaintiffs "confer with the Construction Engineer with a view to agreeing on the extra cost of the jackhammer-cableway method over the explosive-truck method of excavation. If a satisfactory cost figure can be agreed upon, I shall then refer it to the Comptroller General for advance audit." To this the plaintiffs agreed.

35. Plaintiffs and the construction engineer, after both had made careful calculations, agreed that the extra cost of the "jackhammer-cableway method" over the "explosive-truck method" of this rock excavation by reason of the unforeseen conditions encountered was $2.18 a cubic yard. This extra cost of $2.18 a cubic yard added to $3.10 a cubic yard under contract item 6 made the new price fixed for the extra rock excavation ordered and done, and agreed to by the parties, $5.28 a cubic yard. The amount of extra rock so excavated was 3,455.2 cubic yards, and the total price $7,532.34.

36. After the agreement referred to in the preceding finding, the Governor submitted the matter to the Comptroller General for a preaudit approval. On October 22, 1934, the Comptroller General wrote the Governor holding that no payment could be made to the plaintiffs in excess of the unit price of $3.10 under contract item 6.

On November 1, 1934, the executive secretary of the Governor, by direction of the Acting Governor, wrote plaintiffs as follows:

> Referring to your claim for extra compensation for certain rock excavation, the matter was referred to the Comptroller General and a copy of his opinion on the subject, dated October 22, 1934, is enclosed for your information.

37. For the extra rock excavation, plaintiffs were paid only $3.10 a cubic yard under contract item 6, as a result of the Comptroller's ruling. If entitled to be paid the

agreed price referred to in finding 35, there is owing plaintiffs the additional sum of $7,532.34 (3,455.2 cubic yards at $2.18 a cubic yard).

CLAIM 10. EXCESS CONCRETE IN UPSTREAM APRONS

38. Paragraph 123 of the specifications provided as follows:

> * * * Measurement for payment for placing concrete in the aprons, walls, and the floor described in this paragraph will be made on the basis of the average thickness of concrete actually placed at each measured section, up to and including the average thickness shown on the drawings or prescribed by the contracting officer. The location of the sections to be measured and the distances between such measured sections will be determined by the contracting officer. In determining the average thickness at each measured section, consideration will not be given to any thicknesses which are greater than 6 inches in excess of the prescribed average thickness. If the open-cut excavation upon or against which the concrete is to be placed is made to greater dimensions than necessary for placing the prescribed average thicknesses of concrete, the excess spaces shall be solidly filled with concrete. The entire expense of such filling shall be borne by the contractor, except that no charge will be made for cement, which will be furnished to the contractor by the Government under the provisions of paragraph 40: * * *

On the right and left abutments on the upstream side of the dam, concrete aprons were placed. Before the concrete could be placed rock was excavated by plaintiffs to lines and grades as directed and approved by defendant. The finished surface of the rock was irregular caused by the removal by plaintiffs as directed of rotten rock and weather-beaten rock. This had to be done in order to provide a good rock foundation. This left the surface of the foundation uneven, rough, and with deep holes at certain places. These uneven and rough surfaces and the holes were not the result of any over or careless excavation by plaintiffs but were the result of excavation made as required by the contract and as directed by the contracting officer, and the

surfaces as so excavated were accepted and approved by the contracting officer as proper foundations for the aprons before the concrete was placed.

39. After the surface of the rock was in a condition satisfactory to the construction engineer, anchor bars were placed at heights as directed by the construction engineer to the top of which were fastened reinforcing mats as directed. In laying these mats plaintiffs made them fit the uneven surfaces as much as was practicable.

By direction of the contracting officer, the concrete was placed 3 inches above the reinforcing mats and from there the thickness of the concrete was determined by the distance to the surface of the rock at certain points. By the method of measurement followed the contracting officer prescribed an average thickness of 18 inches with a tolerance of 6 inches making the maximum thickness of concrete for payment purposes as construed by defendant 24 inches. The construction engineer and the contracting officer construed the specifications to prohibit payment for concrete more than 24 inches in thickness. But the fixing of the height of the anchor bars determined the thickness of the concrete; however in making the measurements for the purpose of determining the average thickness of the concrete apron the construction engineer and the contracting officer did not give proper or adequate consideration to the deep depressions or holes in the foundation excavation for these aprons, and, upon plaintiffs' claim in that regard that such consideration should be given, the contracting officer refused to do so. In this he failed to comply with paragraph 123. The correct and necessary average thickness of the concrete placed in these aprons was 210.44 cubic yards in excess of the average thickness determined as above stated and paid for.

Defendant paid plaintiffs only for concrete of 24 inches in thickness under contract item No. 53 at the unit price of $10 a cubic yard. In fixing the height of the anchor bars to which the reinforcing mats were attached the defendant determined the thickness of the concrete. There was no controversy as to the amount of concrete placed.

40. The issues between the parties concerned the correct interpretation of paragraph 123 of the specifications for

making payment for the concrete laid in the upstream aprons. By proper protests plaintiffs took the dispute to the construction engineer, the contracting officer, and the Governor, all of whom decided against the plaintiffs and held that plaintiffs were paid for all concrete laid in the upstream aprons, for which paragraph 123 of the specifications permitted payment.

If entitled to payment for the additional 210.44 cubic yards laid in the upstream aprons, there is due plaintiffs the sum of $2,104.40.

CLAIM 11. DRILLING GROUT HOLES

41. The rock underlying Madden Dam was of a seamy and porous character, which required the injection of grout (a mixture of cement, sand, and water in specified proportions) to fill such seams and pores. To do this grout holes were required to be drilled in the rock foundation varying in depths from 25 to 150 feet at distances as directed by the contracting officer. A grout hole is a hole drilled in the rock through which grout is forced into the seams which the hole intercepts, the purpose being to fill up the seams and pores in the rock so as to make the foundation under the dam absolutely tight in order to prevent leakage of water.

Before holes were drilled in the rock, pipes 3 inches in diameter were set with the bottom ends slightly into the rock. As concrete was poured onto the foundation of the dam, these pipes became encased in concrete. The drilling of the holes in the rock was done after the grout pipes were set and the mass concrete poured. After the concrete reached certain depths in the dam, the drilling of the holes and the grouting was done. This drilling operation required the running of the drill through the pipes and drilling holes into the rock beneath to the required depth. The grout was then forced through the pipe under high pressure into the seamy rock below. It sometimes happened that the grout injected through one pipe would come up into another pipe by way of the seams in the rock and harden in that pipe thereby making it necessary for plaintiffs to drill through such grout so as to reach the rock beneath in order to drill a hole in the rock to the required depth.

42. Payment for grout holes was provided for under contract items 36, 37, 38, and 39. Paragraphs 89, 90, and 91 of the specifications gave the directions for grouting. Paragraph 89 reads in part as follows:

> *Drilling grout holes.*—Grout holes shall be drilled in the foundations of the Madden and Left Ridge dams, and elsewhere where required, as shown on the drawings or directed by the contracting officer. * * * Each hole shall be protected from becoming clogged or obstructed by being suitably capped or otherwise protected until it is grouted and any hole becoming obstructed before it is grouted shall be opened up to the satisfaction of the contracting officer by and at the expense of the contractor.

See also paragraph 139 of the specifications. For drilling through the hardened grout in grout pipes into which grout had seeped by way of seams in the rock from pipes under which holes had been drilled and into which grout had been forced, plaintiffs demanded pay at the same unit price as for drilling holes in the rock. The amount of work and expense was the same. As pipes were set by plaintiffs they were all suitably capped at the tops. None of these grout pipes became clogged or obstructed from the top. (See paragraph 91 of the specifications.) That grout found its way into some of the pipes, by way of seams in the rock as a result of grout being forced into other pipes, was due to the condition of the rock and was not due to any fault or negligence on the part of plaintiffs. Plaintiffs demanded pay for drilling grout out of some of the pipes but their claim was refused by the construction engineer. Appeal was taken to the contracting officer and the Governor who sustained the construction engineer on the ground that paragraph 89 of the specifications as they construed it prohibited payment at the rate specified for grout holes for drilling through the grout in the pipes, and in a letter of March 5, 1934, he said:

> *Items 36, 37, 38, and 39—Drilling Grout Holes.*—It cannot be assumed, as appears to be the claim, that the contractor is freed of responsibility for protecting the grout holes from becoming clogged from below, and that his responsibility is confined to what enters at the top. Paragraph 89 is broader in its wording.

If entitled to payment for drilling through grout in pipes, plaintiffs are entitled to recover $1,200.80 on this claim.

CLAIM 12. PAINTING SLUICEWAYS

43. Sluiceways are tunnels going through the dam. The contract provided that each sluiceway should be 5 feet 8 inches wide, 10 feet high, and 180 feet long. Sluiceways were placed in the dam for the purpose of providing means of draining the lake above the dam down to the natural level of the river bed. A gate was to be placed in each sluiceway. About 40 feet of the sluiceway was covered with metal lining and required painting. The rest of the surface of the sluiceway was concrete and required no painting.

Paragraph 135 of the specifications gave directions for painting the metal portions and the provision applicable to this job reads as follows:

> The unmachined surfaces of conduit linings, leaves, and other exposed submerged parts of high-pressure gates, the interiors and bottoms of drum gates, the interior of needle valves, gate guides, trash-rack bars and castings or frames, and similar miscellaneous metal work, not in contact with concrete, shall be given one coat of water-gas tar, if not painted in the shop, followed by two coats of coal-gas tar applied hot, or, where so directed by the contracting officer, painted with one or more coats of an equivalent metal preservative coating applied hot or cold according to the specifications of the manufacturer.

After applying one coat of water-gas tar, plaintiffs were directed to place as a second coat on the sluiceway an application of bituminous enamel. Bituminous enamel was an equivalent of coal-gas tar, except in the method in which the two materials had to be applied. Coal-gas tar was applied at 300° Fahrenheit and bituminous enamel was applied at 550° Fahrenheit. The latter also had to be applied with greater speed and skill.

44. Plaintiffs had no employees who were experienced in applying bituminous enamel and plaintiffs hired painters from the Panama Canal shops with such experience. Plaintiffs asked for instructions as to the application of this enamel and suggested that it be applied by starting at the top and going down. Defendant's inspector directed

plaintiffs to apply this material by starting at the bottom and going up, to which plaintiffs protested. Application in this manner left the surface rough, which would not have occurred if the material had been applied by starting at the top and going down. Thereafter defendant, in writing, ordered plaintiffs to smooth the surface by the use of hot irons. Upon receipt of this written order plaintiffs replied that the work would be performed as directed but objected to being required to bear the expense thereof and claimed reimbursement for the additional cost as extra work. Such smoothing work was not called for by the specifications, nor was the ironing of the surface called for in the specifications of the manufacturer. The additional cost to plaintiffs to smooth the surface as directed was $600 in excess of what it would have cost had the enamel been properly applied from the top down as suggested by plaintiffs at the time. Plaintiffs submitted their claim in this amount to the construction engineer who expressed willingness to consider a claim for $400, but he made no decision. The claim was submitted to the engineer of maintenance, as contracting officer, who denied it, on the basis of his construction of paragraph 135, *supra*, as follows:

> In view of the plain wording of the specifications which prohibits additional compensation on account of kind of paint used, number of coats, or method of application prescribed by the contracting officer, I do not see how the contracting officer can allow any additional payment for this work.

On appeal to the Governor the decision of the engineer of maintenance was sustained on the same ground. Paragraph 135 did not contemplate that plaintiffs should be put to extra costs after they had followed the prescribed method of application.

This claim is not based in any way upon the use of bituminous enamel but upon being required to bear the extra expense necessary to smooth the bituminous enamel after it had been applied on the sluiceways in the manner as directed by the inspector. If plaintiffs are entitled to payment for this unnecessary cost, the amount which they are entitled to recover is $600.

CLAIM 13. BALANCE FOR INSTALLING SLUICE-GATE CYLINDERS

45. In each sluiceway referred to under Claim 12, there was a sluice gate installed. On and as a part of each sluice gate there were two cylinders with oil-operated pistons connected to oil tanks. The oil is the hydraulic medium by which pressure is communicated to the cylinders. This pressure is communicated through pipe lines to the cylinder on the upper or lower side of the piston within the cylinder, and by pressure on the upper or lower side of the piston the gate is opened or closed. Without the cylinders the gates as designed could not be operated.

46. No facts are in dispute. The issue is whether the cylinders on the gates should be paid for under contract item 68, "Installing control apparatus for high-pressure gates" at 10 cents a pound or under contract item 70, "Installing high-pressure hydraulically operated gates and metal conduit linings" at 1¼ cents a pound. This involves the interpretation of the contract items herein referred to, together with paragraphs 142 and 143 of the specifications and drawings referred to in the next finding. Defendant paid plaintiffs under contract item 70. Plaintiffs contended they were entitled to payment under contract item 68.

47. Directions for installing the gates and control apparatus are found in the specifications—paragraph 142, entitled *High-pressure, hydraulically operated gates*, and paragraph 143, entitled *Control apparatus for high-pressure gates*. The drawings, No. 22 (5137–66), entitled "Sluice Gate Chamber Layout," and No. 25 (5137–69), "High Pressure Sluice Gate General Assembly," show the gates and cylinders. Drawing No. 24 (5137–68) shows the control apparatus for these gates, which is designated as "Gate Control Piping and Electric Circuit Diagram."

The weight of the gate cylinders was 168,015 pounds without oil, and with oil their weight was 194,701.54 pounds. If entitled to payment under contract item 68, there is a balance due plaintiffs of $17,036.38 (194,701.54 pounds times 8¾ cents).

This claim was presented to the construction engineer, who held that the cylinders were not control apparatus but part of the gates themselves. The contracting officer held likewise, and on appeal to the Governor these decisions were affirmed.

CLAIM 14. EXCESSIVE CHARGES FOR CEMENT FURNISHED FROM CANAL WAREHOUSES

48. As heretofore shown under claim 7, finding 26, the cement for the Madden Dam project was supplied by the defendant and delivered to plaintiffs without cost at the Madden Dam Siding. During the month of June 1933 plaintiffs made more progress in placing concrete than had been anticipated and they needed more cement than the defendant, under paragraph 101 of the specifications, had been, within ninety days, requested to supply and deliver for use. To avoid a shut-down in the work, the defendant waived the 90-day notice requirement and agreed to supply the additional cement required with a proviso by the construction engineer, "that the contractor will accept bill for all increases in expenses to the Government." To this plaintiffs would not agree and they objected to and protested against the condition that they accept bill as suggested. The defendant delivered cement as needed and there was no trouble until June 29, 1933, when a cargo of cement due on that date did not arrive until July 2nd. Defendant supplied 4,000 barrels of cement from the canal warehouse on June 29 and charged plaintiffs with $665.62 as storage and handling charges. If the cargo of cement had arrived when expected there would have been no necessity for defendant to have gone to the warehouse for cement. Plaintiffs had requested delivery of cement under paragraph 40 from the warehouse without expense to them, and they protested this charge or any charge. Conferences were held and letters were exchanged. On December 7, 1933, the engineer of maintenance, as contracting officer, adopted the recommendation of the general storekeeper as to charges to be made based on the delivery of 4,000 barrels of cement from the warehouse on June 29, of which 2,500 barrels defendant was under obligation to deliver on said date, so the extra ware-

housing charge was divided—that on 2,500 barrels to be assumed by the defendant and that on 1,500 barrels was charged to plaintiffs, making the amount charged to plaintiffs $249.62, which plaintiffs paid under protest on February 13, 1934. The making of this charge and the refusal to remit were the result of the construction of the contract by the contracting officer and head of the department, as follows:

> Under the terms of the contract, the Contracting Officer is required to deliver cement to you to meet your requirements, notice of which, under paragraph 101 of the Specifications, must be given 90 days in advance. I am advised that cement is being delivered to you up to and even in excess of scheduled requirements as heretofore furnished by you.
>
> It appears, therefore, that the contracting officer is not required by the Specifications to furnish the cement requested in your letter. However, I am perfectly willing to let you have such cement as can be spared from the warehouse to carry you through the present emergency; but I know of no way by which I can equitably remit the warehouse charges. It seems clear that the placing of this cement in the warehouse and taking it out again has incurred a definite expense to The Panama Canal which, if the cement is turned over to you, is not chargeable to the Canal under the contract.
>
> * * * I am unable to accede to your request to remit warehouse charges.

CLAIM 15. CHANGE IN PARAPET WALL ON SADDLE DAM NO. 8

49. On March 21, 1933, plaintiffs received from the engineer of maintenance, as contracting officer, a letter, with which there was enclosed a revision and change of contract drawing No. 5130–36. The specifications and original drawing provided for a monolithic concrete wall, that is, a solid wall without construction joints. The revised drawing provided for construction joints at intervals of 15½ feet. The wall was 730 feet long and required 203.3 cubic yards of concrete.

The letter accompanying the revised drawing stated that "The above changes do not involve any change in contract unit prices, nor extension of contract time, nor increase in

the amount of work involved in your contract." This was a change under article 3 of the contract, but the contracting officer gave no consideration to the increased costs and to an "equitable adjustment" under article 3.

Plaintiffs did not make written protest to the change in the work required by this change in drawings until construction work on the parapet wall was commenced the following August. On August 21, 1933, plaintiffs wrote the construction engineer advising that the revised drawing "is requiring considerable added expense [in excess of the cost of the work as originally called for] for which we believe we are entitled to additional compensation." Plaintiffs' failure to protest within 10 days from March 21 was waived by consideration of the protest and claim on the merits. Following this letter of August 21, a number of letters on the merits of the plaintiffs' protest and claim were exchanged between plaintiffs and the engineer of maintenance, as contracting officer, in regard to the added cost of constructing the parapet wall with construction joints shown for the first time in the revised drawing. No agreement as to the added cost was reached and plaintiffs' protest and claim were denied on the ground that the change was one that was authorized to be made under paragraph 43 of the specifications without compensation for added costs. Plaintiffs appealed to the Governor, who affirmed the decision of the contracting officer.

50. The change made under article 3 by the revised drawing added to plaintiffs' cost in the construction of the parapet wall $1.81 a cubic yard, or a total of $367.97 in excess of what the construction of the wall would have cost if it had been constructed in accordance with the original drawing and specifications.

CLAIM 16. INSTALLATION OF PEN STOCKS, OUTLET PIPES, AND BUTTERFLY VALVES

51. The pen stocks are the pipes through the dam into the powerhouse which permit the water to enter the turbines used to generate power. The butterfly valves are installed in the pen stocks to control the flow of the volume of water

into the turbines. The outlet pipes are those that let water through the powerhouse.

The installation of the pen stocks, outlet pipes, and butterfly valves was shown on contract drawings Nos. 5137–84 and 5137–90. Paragraph 144 of the specifications contains the following:

> *Butterfly valves.*—The five 132-inch remote-controlled, motor-operated emergency butterfly valves, with their operating mechanisms, supply, bypass, vent and drain piping, and the conduit lining castings with bolts and gaskets for installation upstream and downstream from these valves, will be furnished by the Government complete ready for installation under the provisions of paragraph 40.

52. On June 28, 1932, plaintiffs received from the contracting officer revised drawings Nos. 5137–92, 5137–93, and 5133–83 covering this work. These revised drawings constituted a change under article 3 of the contract and increased the cost of installing the pen stocks, outlet pipes, and butterfly valves, and reduced the weight of the material to be installed by 387,621 pounds thereby making plaintiffs' compensation less under contract items 69 and 71, two cents for each pound reduced. The weight of the material to be installed was reduced by defendant by substituting thin steel pipe in place of heavy semicast steel called for by the contract. The increased cost of installation in accordance with the change, due to extra work required and called for over what such cost would otherwise have been for the work as originally specified and called for, was $910.83 and the loss on the unit price because of the change of material, thereby reducing the weight of the material to be installed, was $7,752.42. The substituted material of less weight was as expensive to install as the material originally specified. Article 3 of the contract provides in part as follows:

> *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required

> for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * * Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered. * * *

Paragraph 2 of the specifications reads in part as follows:

> *Quantities and unit prices.*—The quantities noted in the schedule are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative.

Paragraph 134 of the specifications provides in part as follows:

> *Weights of machinery and metal parts.*—The weights of metal and other parts, the handling and placing of which is to be paid for on the basis of weight, will be determined by the contracting officer. The weights of these items given in the schedule are advance estimates for the purpose of comparing bids only, and the actual weights may vary widely therefrom.

53. On October 23, 1933, plaintiffs made written protest to the construction engineer and claimed payment on the basis of an equitable adjustment because of the changes ordered, for the necessary increased cost of installing the afore-named items, and for loss caused by substitution of different material and reduction in weight of the material to be installed. Although this protest and claim was not made within ten days from the date the change was ordered, such ten-day requirement was waived by consideration of the protest and claim on the merits. On October 22, 1933, the construction engineer denied the claim. An appeal was taken to the engineer of maintenance, as contracting officer, who sustained the decision of the construction engineer and denied the claim on the ground that the changes were authorized by paragraphs 2 and 43 of the specifications. Appeal was then taken to the Governor who affirmed the decision of the contracting officer.

CLAIM 17. INSTALLING DRAIN PIPES UNDER THE UPSTREAM APRON UPSTREAM FROM BLOCK NO. 11

54. By reason of the cracked and seamy character of the rock and the then location of the coffer dam the construction

engineer agreed with plaintiffs' suggestion on December 13, 1932, that before placing the upstream apron upstream from block No. 11 it was desirable to safe progress of the work that some additional drainage facilities not specifically shown on the plans should be installed before the concrete was placed. Plaintiffs suggested the placing of pipes for this purpose and the construction engineer furnished plaintiffs with a penciled sketch showing the drain pipes and such pipes were installed by plaintiffs. Neither the construction engineer nor the contracting officer ordered or directed the installation of these pipes. Nothing was said at the time about additional pay to plaintiffs for installing the drain pipes. The work was completed on January 3, 1933.

55. On June 29, 1933, plaintiffs submitted a bill for $179.79 covering the labor costs only. On July 8, 1933, the construction engineer in a letter disallowed the bill on the ground that the drain pipes served no useful purposes for the defendant and that they were installed for the convenience of the plaintiffs, "in order that you might with safety carry out your construction plan of placing the concrete apron prior to turning the river through the diversion channel." On appeal to the engineer of maintenance the plaintiffs submitted an itemized statement of the cost of installing the drain pipes in the amount of $293.07, which was the actual cost to plaintiffs including 10% for profit. On August 8, 1933, the engineer of maintenance sustained the decision of the construction engineer and further stated as follows:

> Your attention is invited to Paragraph 6 of the specifications which requires a protest within 10 days, and to Paragraph 3 which clearly contemplates that before any extra is undertaken for which payment is made an agreement must be made on price. It seems clear that there was no thought at that time that any payment would or should be made for this work and since a protest was not made within 10 days it appears that the specifications may not permit such payment.

Plaintiffs appealed to the Governor who denied the claim on the ground that this work was not ordered by the Government and that there was no agreement that it would be paid for as an extra.

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CLAIM 18. STRIPPING QUARRY NO. 1

56. The specifications required the use of igneous rock for facing on Saddle Dams Nos. 5 and 8. Such rock was located by defendant in what was designated as "Quarry No. 1," situated immediately along the side of the roadway from Madden Dam to Panama City, about five miles from the dam. Paragraph 70 of the specifications provided that "* * * The areas of all borrow pits, or the portions thereof, approved by the contracting officer for embankment materials shall be cleared and grubbed and stripped by the contractor as provided in paragraphs 57 and 60 respectively." Paragraph 60 provided in part that "* * * Measurement for payment for stripping will be made in excavation and will include only the stripping in locations and to the depths as directed or approved by the contracting officer. Payment for stripping, and disposal of materials wasted by stripping, as described in this paragraph will be made at the unit price per cubic yard bid in the schedule for stripping for embankments and borrow pits."

57. Materials had to be stripped immediately over the quarry in order to reach the rock. The contracting officer staked the limits of the quarry and under paragraphs 57, 60, and 70, determined and made measurements for payment for clearing, grubbing, and stripping within vertical lines projecting from the actual excavated approved areas of bedrock and from the bedrock to the surface of the ground as shown on sheet 1, a blueprint, of plaintiffs' exhibit 18, which sheet is made a part hereof by reference. Plaintiffs also excavated a certain amount of material between the existing roadway from Madden Dam to Panama City and the quarry, as shown on sheet 1, *supra*, in order to get to and remove the igneous rock. This material was not over the rock in the quarry but was along the side of the quarry and between the lines established by the contracting officer and the Madden road. For this last mentioned excavation the defendant refused to pay on the ground that it was not within the area as directed by the

contracting officer and was not stripping but constituted an access road for which plaintiffs were not entitled to payment under paragraph 52. A total of 1,194.08 cubic yards was thus excavated for which plaintiffs were not paid. If entitled to pay for this excavation under contract unit item 3, at forty cents a cubic yard, there is due plaintiffs the sum of $477.63.

58. On January 18, 1933, plaintiffs demanded, in writing, payment under contract item No. 3 for all stripping done. April 5, 1933, the engineer of maintenance wrote plaintiffs that "No payment can be made you for material removed from the side of material suitable for riprap since it is not within an approved area." May 2, 1934, plaintiffs appealed to the Governor who in a letter of May 9, 1934, wrote in part as follows:

> The Engineer of Maintenance in his letter to you of April 5, 1933, made a decision on this question. No written appeal was made by you to this decision within the thirty days allowed by Article 15 of the contract. I have to inform you that I do not feel justified in altering the decision of the Assistant Engineer of Maintenance contained in his letter of April 30, 1934, or of the Engineer of Maintenance contained in his letter of April 5, 1933.

In this decision the Governor considered and decided the appeal on the merits notwithstanding it was not filed within 30 days from April 5, 1933. The measurements made and the decisions on the protest were not arbitrary or grossly erroneous.

CLAIM 19. POWERHOUSE CONCRETE PAID FOR AS TRAINING WALL CONCRETE

59. Part of the left training wall of the dam formed part of the north wall of the powerhouse or *vice versa.* That part of the left training wall which formed part of the north wall of the powerhouse was all paid for by defendant as training wall concrete. Plaintiffs contended that this part of the training wall forming a part of the north wall of the powerhouse should be paid for in whole or in part as

powerhouse concrete. The contract provided in the units of work definite prices for concrete in different locations which insofar as pertinent to this claim were as follows: Item 59, Concrete in powerhouse below generator floor, $10 per cubic yard; Item 60, Concrete in powerhouse above generator floor, $15 per cubic yard; Item 49, Concrete in spillway training walls, $3 per cubic yard; Item 48, Concrete in Madden Dam, $2.50 per cubic yard.

Whether plaintiffs are entitled to recover on this claim depends on the correct interpretation of the following specifications and drawings.

Paragraph 119 of the specifications reads as follows:

> *Concrete in spillway training walls.*—The item of the schedule, "Concrete in spillway training walls," includes all concrete in each training wall between the planes, or extended planes, of the river and abutment faces of that training wall, except the lateral extensions of the spillway apron and of the theoretical or regular abutment sections through the face planes of that training wall, and except the portion of the powerhouse which sets 3 feet into the left training wall. A considerably richer mixture of concrete will be required for the training walls than for the mass concrete in the dam. This mixture shall be as directed by the contracting officer. Particular care shall be taken in forming the training walls and in tamping and spading the wet concrete adjacent to the forms, to the end that a smooth and durable surface will result.

Paragraph 129 of the specifications reads in part as follows:

> *Concrete in powerhouse.*—For the purposes of payment, the concrete in the powerhouse is separated into two items in the schedule; viz, "Concrete in powerhouse below generator floor" and "Concrete in powerhouse above generator floor." The first item includes all concrete in the power plant below the elevation of the generator floor, downstream from the theoretical or regular downstream slope of the dam and to the left of the plane of the abutment face of the left training wall, except the slope wall downstream from the powerhouse and the tailrace floor as described in paragraph 123. The second item includes all concrete in the power plant above the elevation of the generator floor, downstream from the theoretical or regular down-

stream slope of the dam and to the left of the plane of the abutment face of the left training wall, except the slope wall downstream from the powerhouse, and includes the concrete in the loading platform. This second item does not include any of the highway paving, curbs, and retaining wall. In addition to concrete in columns, walls, floors, and other members of the building, both items include concrete, as required, in pedestals, anchors, and foundations for machinery.

The contract drawings 5133–51, 5133–52, and 5133–62 (respectively sheets 22, 23, and 24 of plaintiffs' exhibit 19) made a part hereof by reference, showed the north wall of the powerhouse extending three feet into the left training wall, that is, part of such wall was shown as "training wall" and part of it as "powerhouse wall."

That part of the training wall below the powerhouse was poured first. That part of the training wall, which formed a part of the north wall, and the west wall of the powerhouse were afterwards poured at the same time. The training wall is eight feet thick its entire length. The walls of the powerhouse, except that part of its north wall which formed a part of the left training wall, are from two to five feet thick. Revised drawing No. 5133–186 R–1 shows the north wall of the powerhouse as extending 7 feet 9 inches into the left training wall.

60. Plaintiffs duly protested and appealed and their protest and appeal were denied under the construction placed upon paragraphs 119 and 129 of the specifications by the contracting officer and the head of the department.

(a) If all the left training wall which forms a part of the north wall of the powerhouse should be paid for as powerhouse concrete, there is due plaintiffs the sum of $6,194.43.

(b) If only three feet of the left training wall which forms a part of the north wall of the powerhouse should be paid for as powerhouse concrete, there is due plaintiffs the sum of $2,769.48.

(c) If all that part of the left training wall which forms a part of the north wall of the powerhouse should be paid for as training wall concrete, there is nothing due plaintiffs on this claim.

CLAIM 20. EARTH CUSHION OVER ROCK BELOW ROAD SLABS IN HIGHWAYS

61. The question in this claim is whether plaintiffs are entitled to any pay for placing and properly working a cushion of earth material one foot thick on the powerhouse road over which the concrete slabs were laid.

As originally contemplated and prescribed by the contract the roadway was to be built on the rock surface as excavated but by change and extra work order No. 2, dated January 6, 1932, the plaintiffs were required to excavate rock surfaces to an elevation one foot below subgrade, for which they were paid at the contract unit rate. After the excavation so ordered was made an earth cushion of one foot was required to be obtained and placed on which was to be laid the slabs of concrete.

At the time this road was ready for the earth cushion, there was no required excavation material available. Plaintiffs obtained the necessary suitable material from borrow pits and areas where material had been wasted.

62. The plaintiffs were not paid anything for the one-foot earth fill over the rock portions that was required by the contracting officer to be made before concrete was placed. On February 22, 1934, plaintiffs protested such nonpayment. Correspondence followed. Defendant's refusal to pay plaintiffs any amount for the work and expense of excavating the necessary suitable material for the earth cushion was based on the interpretation which the contracting officer and the head of the department placed on paragraph 78 of the specifications.

The amount of material required to be excavated from borrow pits and placed for the earth cushion referred to above was 1,676.31 cubic yards. If entitled to payment, there is due plaintiffs under contract item No. 11, at $1.50 a cubic yard, the sum of $2,514.47.

CLAIM 21. ADDITIONAL ROCK EXCAVATION IN BLOCKS 13, 14, AND 15

63. Prior to and early in 1933 plaintiffs excavated the areas to be covered by Block Nos. 13, 14, and 15 of

Madden Dam to depths and grades as directed by the construction engineer. The depths and grades to which excavated were not the finished grades including final trimming as required by the contracting officer for the foundation for Madden Dam, but were the depths and grades required by plaintiffs for the excavation of a diversion channel. When the first excavation in this area was completed early in 1933 the area was approved and accepted by defendant. Later plaintiffs were required by the construction engineer to excavate to lower levels by hand methods which were more expensive than excavation with explosives.

64. December 2, 1933, plaintiffs wrote the construction engineer as follows:

> We have received verbal instruction to begin additional excavation in Blocks 13, 14, and 15 without the use of explosives. As this area was ready for concrete before river diversion, we protest the doing of this work under Item 6. This work is in every way comparable with Item 7 [rock excavation for cut-off trenches] and we believe it should be classified under that heading.

Plaintiffs performed the rock excavation as directed and were paid under contract item 6, rock excavation for Madden Dam, at $3.10 a cubic yard. January 17, 1934, plaintiffs protested payment for this work under contract item 6 and demanded payment at a price sufficient to cover alleged extra cost of excavation. This rock excavation was 1,430 cubic yards. The cost of this excavation did not exceed $3.34 a cubic yard.

On May 5, 1934, the construction engineer wrote plaintiffs as follows:

> The above excavation is properly classified under Item 6, Rock Excavation for Madden Dam, in accordance with Par. 64 of the Specifications, which states, "Whenever, in the opinion of the contracting officer, further blasting is liable to injure the rock upon or against which concrete, or earth blanketing, is to be placed, the use of explosives shall be discontinued and the excavation completed by wedging or barring or other suitable methods. * * * Payment for all excavation referred to in this paragraph will be made at the unit price bid in the schedule for excavation for Madden Dam and counterforted wall."

Plaintiffs appealed to the engineer of maintenance, as contracting officer, who decided as follows:

> In the second paragraph of your letter of May 9th it is noted you state that, "During the major excavation operations in this area completed prior to January 1933, the rock surface was cleaned and trimmed in accordance with instructions from the Government engineers." I am unable to verify this statement, and the evidence is that grades were given only to provide spillway for your purpose. Moreover, before the water was turned into this area, there were clear indications that more rock would have to be removed, even more than just surface material.
>
> As to the paving mentioned in your letter of June 6th, you are advised that it would not have been approved at that level. As a matter of fact, I do not remember that such a project was ever presented to me for consideration.
>
> Your attention is called also to the fact that paragraph 64 of the specifications clearly gives to the Government the right to control the excavation method. This case is not similar to Blocks 1, 2, and 3, because in that case an unforeseen condition arose in connection with the "popping" nature of the rock.
>
> The action of the Construction Engineer in classifying this material for payment under Item 6 must therefore be sustained.

Plaintiffs appealed to the Governor and he sustained the decision of the engineer of maintenance.

CLAIM 22. ROCK EXCAVATION FOR SPECIAL FEATURES

65. As the work of excavating the Madden Dam foundations proceeded, plaintiffs were ordered from time to time by extra drawings prepared and issued by the contracting officer to make changes or additions not shown on the contract drawings or referred to under the specifications. Plaintiffs performed the following additional work as directed and ordered in writing by the contracting officer:

(1) Excavated a small trench to drain around compressor room; (2) Excavated the compressor room to neat lines; (3) Placed a tile trench around compressor room; (4) Dug a trench for water pipe about 163 feet west of axis; (5) Excavated for transfer truck bearing walls.

These extra items of work involved a total of 338.57 cubic yards of rock excavation. All the items above, except item 2, involved rock excavation which was of the same character and as difficult and expensive, or more so than rock excavation for cut-off trenches under contract item No. 7, and plaintiffs claimed payment at the rate of $10 a cubic yard.

Item 2 above involved rock excavation of 210.5 cubic yards which was less difficult than the excavation of the other four items named above, and plaintiffs claimed additional payment for item 2 at the rate of $2.18 a cubic yard. Defendant paid plaintiffs, under contract item 6, $3.10 a cubic yard for all these additional excavations as rock excavation for Madden Dam. Plaintiffs duly protested and appealed.

66. The contracting officer conceded that the work ordered and performed by plaintiffs was more expensive and difficult than ordinary rock excavation for Madden Dam but held upon his interpretation of the specifications that the rates of pay for rock excavation were not based on the difficulties involved but on the location of the rock. He denied the claim on the ground that the work ordered came under par. 64 of the specifications and unit work item 6. On appeal to the Governor the decision of the contracting officer was sustained.

If entitled to payment at $10 for items 1 and 3 to 5, inclusive, and $2.18 for item 2, for excavation here involved, there is an unpaid balance due plaintiffs of $1,346.92.

CLAIM 23. CUT-OFF TRENCH EXCAVATION BELOW TAILRACE SLOPE PAVING

67. This claim also relates to the classification of rock excavation for the purpose of payment. By a revised drawing and letter a change was ordered whereby plaintiffs were required to remove rock by hand for a cut-off trench. The amount of rock actually excavated was 6.48 cubic yards. Plaintiffs were paid under contract item 6, "rock excavation for Madden Dam," at $3.10 a cubic yard. Plaintiffs claimed that they should be paid under contract item 7 at the rate

of $10 a cubic yard, the rate fixed for cut-off trench excavation.

68. May 14, 1934, plaintiffs wrote the engineer of maintenance, the contracting officer, as follows:

> Receipt is acknowledged of your letter of May 11, 1934, transmitting Revision No. 1 for Drawing 5133–265.
>
> We assume that the increased amount of concrete paving involved will be paid under Item No. 53, the added cut-off trench will be paid under Item No. 7, and the added dowels under Item No. 40 of the schedule.
>
> Please advise if we are correct in this matter.

May 19, 1934, the engineer of maintenance wrote plaintiffs as follows:

> As stated by you, the increased amount of concrete shown in this change will be paid for under Item 53 and the added dowels under Item No. 40. The excavation, however, does not appear to be rock excavation of cut-off trenches as prescribed in paragraph 65 or 66 of the specifications. It would appear, therefore, that the excavation is properly payable under Items 5 and 6.

An appeal was taken to the Governor who confirmed the decision of the engineer of maintenance.

If entitled to payment under contract item 7, there is a balance due plaintiffs of $44.71.

CLAIM 24. BALANCE ON ACCOUNT OF EXTRA WORK AND EXPENSE CAUSED BY CHANGED POWERHOUSE CONSTRUCTION

69. Plaintiffs commenced the construction of the powerhouse in October or November 1932, and stopped in January 1933, having constructed at that time only that part of the substructure for which drawings had been issued. Plaintiffs resumed work on the powerhouse early in 1934 after the necessary river diversion from the powerhouse had been performed, and finished the work on the powerhouse in late 1934. Between the commencement and completion of the powerhouse, written changes in construction as called for and specified in the original drawings were made by several hundred revised designs accompanied by about 140 letters of transmittal. These changes were de-

livered to the plaintiffs beginning October 17, 1933, and continuing to October 25, 1934. These revised drawings not only revised and changed the original drawings, but again revised many times the prior revisions. Some of the drawings involving radical changes are as follows and were transmitted on the following dates:

Drawing No. 5133–161 on October 17, 1933.
Drawing No. 5133–163 on October 17, 1933.
Drawing No. 5133–158 on December 27, 1933.
Drawing No. 5133–159 on March 22, 1934.
Drawing No. 5133–166 on April 13, 1934.

Each of the above revised drawings, as well as several hundred revised drawings, was transmitted by the defendant's engineers to the plaintiffs with an order in writing by the contracting officer to perform the work as shown and stating:

> The additional information conveyed to you through these drawings involves no change in contract unit prices, nor extension of time, nor increase in the amount of work to be performed under your contract.

70. While a number of the revised drawings were being prepared by the contracting officer and delivered to plaintiffs, the plaintiffs, not having commenced the work thereunder, did not carefully check the revised drawings to determine the accuracy thereof, or the extent to which they required extra or more expensive work than called for by the original drawings and specifications. When approximately all the revised drawings had been received and plaintiffs had commenced the actual construction of the powerhouse in accordance therewith, the plaintiffs found and ascertained that the statements in the letters of transmittal, to the effect that the changes ordered and produced by the revised and changed drawings involved no increase in the unit prices or the amount of work to be performed, were incorrect.

71. Plaintiffs constructed the powerhouse according to directions and the revised drawings and designs, and the added and extra costs to plaintiffs consisted chiefly in the construction of forms for the concrete and the placing of the concrete to meet the requirements of the revised designs.

The concrete work in the powerhouse was paid for under item 59, "Concrete in powerhouse below generator floor, $10 per cubic yard," and contract item 60, "Concrete in powerhouse above generator floor, $15 per cubic yard." If, on account of these changes and increased costs of construction resulting exclusively from the doing of the work as called for therein, plaintiffs are entitled to be paid for concrete in the powerhouse as so changed at a higher price under the provisions of paragraph 117 of the specifications, which provided that "* * * any required concrete, for the works covered by these specifications, not definitely covered by an item of the schedule shall be included for payment under the item of the schedule which most nearly applies, * * *" then the most nearly applicable unit prices to the portions of the work as called for and as actually performed under the changes are item 60—"Concrete in the powerhouse above the generator floor, $15 per cubic yard," for a portion of the powerhouse concrete (2,342.65 cubic yards) placed below the generator floor, and item 54—"Concrete in counterforted wall," at $20 a cubic yard, for a portion of the powerhouse concrete (419.83 cubic yards) placed above the generator floor. This difference of $5 a cubic yard over what plaintiffs have been paid and the above unit prices on the above quantities would represent a total difference in payment of $13,812.40 on the classification basis. If plaintiffs are entitled to recover on this classification basis recovery should be for the sum of $13,812.40.

72. The actual and necessary increased cost to plaintiffs in performing the portions of the concrete work on the powerhouse as changed, over what that work as originally specified and required would have cost, was $8,000. A profit of 10% on this amount is $800.

73. Plaintiffs first protested and made claim for extra compensation on October 29, 1934, by letter to the contracting officer for additional costs incurred on account of the changes ordered in the revised designs referred to in the preceding finding.

November 10, 1934, the engineer of maintenance wrote plaintiffs holding that the changes made were authorized

under article 3 of the contract and paragraphs 2 and 43 of the specifications, and closed his letter as follows:

> It is believed that the changes made are reasonable changes such as are specifically authorized under article 3 of the contract and paragraph 43 of the specifications. Therefore, since the contract specifically provides that no claim shall be made against the Government for excess or deficiency in quantities since the work done appears to be correctly classified under the proper item of the schedule, and since claim was not made in accordance with the terms of the contract, it is felt that your claim for extra compensation must be disapproved.

November 21, 1934, plaintiffs appealed to the Governor who confirmed the decision of the engineer of maintenance and held that plaintiffs were not entitled to any extra compensation for the concrete work performed in the powerhouse under the changes ordered. The engineer of maintenance, acting as the contracting officer under written delegated authority, and the Governor, as the head of the department, considered and decided plaintiffs' protests on the merits. The decisions on the merits were arbitrary and so grossly erroneous as to imply bad faith.

CLAIM 25. UNPAID BILLS

74. Certain machinery and equipment were to be furnished by defendant and installed by plaintiffs. It was necessary for plaintiffs to make some corrections and changes before the same could be installed satisfactorily. Plaintiffs made claim and submitted the following bills to defendant:

(1) Cost of removing and replacing lock nut assemblies on Butterfly Valves	$70.56
(2) Milling flanges on By-pass and Air Vent Pipes for Butterfly Valves	15.32
(3) Reaming holes in Plates D-3-b-9	3.52
(4) Correcting Drum Gates	118.18
(5) Removing and replacing concrete in block #5 damaged by Government Inspector	77.93
Total	285.51

The amount set forth under each of the items above represents the extra costs to plaintiffs in doing the work mentioned. Plaintiffs were directed by defendant to do the work in bills 1, 2, 4, and 5 above.

75. The claim for payment of item 1 for $70.56 was rejected by the defendant because plaintiffs did not make timely protest.

Claim for payment of item 2 for $15.32 was for work done by plaintiffs which they claimed was made necessary by defendant's engineers giving wrong lines and grades for setting of pen stocks and outlet pipes. The contracting officer found the facts to the contrary. The bill was rejected by defendant.

Claim for payment of item 3 above in the sum of $3.52 was for work done without order from or knowledge of the defendant. This bill was rejected.

Claim for payment of item 4 above in the sum of $118.18 was for seven separate items of work performed by plaintiffs when installing drum gates. The contracting officer and head of the department denied this claim on the finding that it involved the correction of minor errors and inaccuracies in manufacture as covered by paragraph 133 of the specifications which reads as follows:

> The unit price bid for installing gates, valves, control mechanisms, piping, and other miscellaneous items of metal work shall include the cost of making minor changes and the cost of correcting such minor errors and inaccuracies in the various parts as may be expected to occur in the ordinary commercial grade of shop work and manufacture of such materials, as determined by the contracting officer.

Plaintiffs' claim for payment of item 5 above for removing and replacing concrete in Block No. 5 in the sum of $77.93 arose by reason of the fact that an air test was made by defendant's authorized inspectors of a portion of the contraction joint grouting system before freshly poured concrete adjacent to these grout pipes had sufficiently set. As a result, this concrete was damaged by pressure of the air prematurely applied and plaintiffs were required to replace the concrete at a cost of $77.93. This damage to

the concrete was not due to any fault of plaintiffs but to the act of the defendant's authorized inspectors which plaintiffs could not prevent.

CLAIM 26. CHIPPING CONCRETE SURFACES AT HORIZONTAL CONSTRUCTION JOINTS

76. Paragraph 111 of the specifications prescribed the method and manner of cleaning the concrete at construction joints before placing additional concrete thereon. In January 1934, the construction engineer, with the approval of the engineer of maintenance as contracting officer, directed and required plaintiffs to pick down into the concrete along the side of the pen stocks and discharge pipes to a depth of an inch, more or less, before applying other cleaning methods. The location where this cleaning work was required was cramped. It presented a special situation requiring careful treatment, and the specification methods as they were being performed by plaintiffs were deemed inadequate by the contracting officer. Plaintiffs protested the doing of such picking as unreasonable and unnecessary under the specifications and asked for extra payment therefor. The claim was denied. The work was done by plaintiffs at a cost of $104.54. Appeal was taken to the Governor and he sustained the engineers. The picking work required was authorized and provided for by paragraph 111 of the specifications, as follows:

> *First.* As soon as the concrete surface has taken its initial set, the entire surface shall be brushed with stiff wire brooms, and all loosened materials shall be immediately removed.
>
> *Second.* When the concrete has set sufficiently to withstand a jet of water at high velocity, it shall be thoroughly washed by a jet of air and water applied at high velocity, and during this washing operation all soft spots shall be picked loose and removed. Alternate washing and picking shall continue until the entire surface is clean and hard.
>
> *Third.* Immediately prior to the placing of the succeeding layer of concrete the surface shall again be washed to remove dirt, chips, and all foreign matter which may have accumulated since the second operation, but shall be left free from pools of water.

CLAIM 27. CHARGE FOR ERECTION BOLTS FURNISHED BY MANUFACTURERS OF DRUM GATES, ETC.

77. This claim involves the correct interpretation of paragraphs 40, 41, and 148 of the specifications. Paragraph 40, entitled "Materials furnished by the Government," provided that "The Government will furnish cement for use in concrete, plaster, and grout; * * * reinforcement bars; anchor bars, rods, and bolts; * * * gates and hoists, including drum gates, * * *; and all other materials not specifically mentioned in this paragraph or in paragraph 41 that will become a part of the completed construction work." Paragraph 41, entitled "Materials to be furnished by the Contractor," provided that "The contractor shall furnish * * * all form materials, including bolts, spikes, and nails and oil for oiling forms; * * * and also all other required materials not specifically mentioned in this paragraph or in paragraph 40, that will not become a part of the completed construction work. * * * The cost of * * * furnishing all the materials required to be furnished by the contractor shall be included in the prices bid for the work for which the materials are required." Paragraph 148, entitled "Structural steel for power plant," had this provision: "All structural steel framework for the power plant, * * * with a supply of rivets and erection bolts for field erection will be furnished by the Government, as provided in paragraph 40."

In the installation of drum gates and penstocks which were furnished by the Government erection bolts were used in the field temporarily for holding parts of the equipment in place while the same were being riveted, and as the riveting reached completion the erection bolts were removed and did not remain as a permanent part of the installation. The erection bolts were furnished by and came with the equipment from the manufacturer. The defendant charged the cost of the bolts necessary for the erection of the drum gates against the plaintiffs in the amount of $279.22. Plaintiffs paid this amount to the defendant under protest.

CLAIM 28. SAWING DRUM GATE HINGE CASTINGS

78. Drum gates were installed on Madden Dam, which gates by being lowered or raised regulated the depth of the water above the dam. These gates were numbered 1, 2, 3, and 4, respectively. The gates, including hinge castings, were furnished by the defendant under the contract. Plaintiffs were required to assemble the parts of each gate and to install the gates. When erecting gate No. 1, after it had been assembled and welded by plaintiffs, it was found that the same would not fit and could not be installed without sawing off certain portions of the gate hinge castings. Such sawing was done under the directions of defendant's representatives at an actual cost of $242.89. Plaintiffs claimed that the defects which necessitated the sawing off of certain portions of the gate hinge castings were those of the manufacturer, and that this was more than a minor defect. The welding done by plaintiffs was in the presence of defendant's inspectors. There was some change made by plaintiffs in the method of welding on drum gates 2, 3, and 4, and no difficulty was encountered in properly installing drum gates 2, 3, and 4.

79. The construction engineer refused to approve payment of the additional amount claimed on the ground, which he found as a fact, that the inaccuracies were caused by plaintiffs' method of welding certain of the gate parts. The contracting officer likewise found this fact and on appeal the Governor confirmed the decisions of the construction engineer and the contracting officer.

CLAIM 29. MATERIALS TRANSPORTED BY GOVERNMENT

80. This claim concerns the amount due plaintiffs for government material which plaintiffs agreed and contracted to transport as provided in paragraph 165 of the specifications, but which material the Government hauled with its own equipment. Under this paragraph plaintiffs agreed and were required to unload and haul all materials used by defendant in certain work which it contemplated doing at

the site of Madden Dam or in the powerhouse, and the price of such hauling, under contract item 94, was fixed at $1 per hundredweight. Plaintiffs were prepared and able to do all such hauling at a gross cost of $0.1408 per hundredweight. The difference represented their net profit for such work. Certain materials were hauled by plaintiffs.

81. There is no dispute as to the fact that the defendant, instead of permitting plaintiffs to haul certain materials, itself hauled 36,088 pounds of material from the Panama shops and elsewhere to Madden Dam, which hauling resulted in a loss of profit to the plaintiffs of $310.07, which they otherwise would have earned over and above the actual cost of hauling, had they been permitted to do that hauling.

There was correspondence between plaintiffs and the defendant on this matter in which plaintiffs claimed payment at the contract price less cost of hauling. The construction engineer agreed to settle with plaintiffs for the sum of $268.81. The contracting officer, however, decided that he had no authority to make any payment under the circumstances, and advised plaintiffs as follows:

> Administrative officers of the Government are not authorized to adjust and settle claims for damages growing out of breach of contract. Such settlements must be made by the Courts.

On appeal the Governor sustained the decision of the engineer of maintenance.

CLAIM 30. BALANCE DUE FOR MOORING OUTRIGGER ON TRASH-RACK STRUCTURE

82. The trash rack was located on the upper side of the dam to prevent the intake of trash into pen stocks. No provision or reference was made in the original specifications or drawings for a mooring outrigger. By letter of February 7, 1934, plaintiffs were furnished with revised drawing 5137–587 showing a steel mooring outrigger to be attached adjacent to the trash-rack structure, which was ordered as an extra item of work. The outrigger was a ladderlike structure of steel, so designed as to afford a place to which boats could be moored at whatever level the water might be

in the basin above the dam. The letter above referred to advised plaintiffs that this work would be paid for under contract item 76, "Installing Trash Rack Metalwork," at one cent a pound.

83. The mooring outrigger was not a part of the trash rack metal work or structure, but was built into the concrete adjacent to the trash rack for the purpose of mooring trash scows. It was "Miscellaneous Metal Work" as prescribed and defined in paragraph 164 of the specifications.

On October 19, 1934, plaintiffs wrote to the construction engineer protesting the payment and installation of the mooring outrigger under contract item 76, and claimed it should be paid for under contract item 93, "Installing Miscellaneous Metal Work" at ten cents a pound. October 24, 1934, the construction engineer wrote plaintiffs that their failure to protest within ten days from the date of the letter transmitting the drawing for this work prevented him from considering the claim. Plaintiffs protested and made claim to the contracting officer, explained the delay in filing a protest, and objected to the classification of this work under trash rack metal work under paragraph 149 and asked that it be classified and paid for as miscellaneous metal work under paragraph 164 of the specifications. The contracting officer received, considered, and decided the protest and claim on the merits and denied them. On appeal the Governor denied the claim for the following reasons:

> From my review of this case, it appears that this material is properly a part of the trash rack structure as modified under paragraph 43 of the specifications and is therefore payable under Schedule Item 76. I am unable, therefore, to change the decision of the Assistant Engineer of Maintenance.

Paragraph 149 of the specifications provides, so far as material, as follows:

> *Trash rack metal work.*—Trash rack bars, castings, structural-steel supports and guides, anchor plates and bars for all trash racks, and guides for the rake for the pen stock trash rack structure will be furnished by the Government under the provisions of paragraph 40. * * * Payment for installing and painting all trash

rack metal work, except as otherwise provided in paragraph 146 for trash racks over the inlets to the drum gate chambers, will be made at the unit price per pound bid in the schedule for installing trash rack metal work.

Paragraph 164 provided as follows:

Miscellaneous metal work.—Installing and painting hatchways, manholes, oil tanks, metal ladders, ladder rungs in concrete, gratings, stair nosings, anchor bars, rods and bolts set in concrete for installation of permanent equipment drain-boxes and gratings, brackets, and other miscellaneous metal work not specifically included in other items of the schedule, for which installation and payment has not been specifically provided for elsewhere in these specifications and which are to be furnished by the Government and become a part of the completed work, will be paid for at the unit price per pound bid in the schedule for "Installing miscellaneous metal work," which unit price shall include the cost of * * * the complete installation of this metal work, as shown on the drawings or as directed by the contracting officer.

84. If entitled to be paid as under contract item 93, specification 164, instead of item 76, specification 149, as paid, there is a balance due the plaintiffs on such account of $215.24.

CLAIM 31. CONCRETE IN STAIRWAY AND HANDRAIL LEADING TO ADIT ENTRANCE IN BLOCK NO. 1

85. This claim is concerned with the question as to whether or not the concrete in the stairway and handrail, located on the top of and near the end of the dam, on the right abutment, should be classified as Madden Dam concrete at $2.50, unit of work item 48, or as "Concrete in spillway bridge and parapets on abutment section," at $10 a cubic yard, unit of work item 51.

The contract and original plans showed and called for a ramp with pipe handrail and bracketed balcony to provide access to one of the gallery entrances of the dam which came out through block No. 1 on the downstream side of the dam. On February 7, 1934, the contracting officer by revised plans and written order changed this ramp

to a concrete stairway, with concrete handrail or parapet, and this stairway and parapet constructed under and in accordance with the revised plans and change order were thereafter classified and paid for under contract item 48, "Concrete in Madden Dam," at $2.50 a cubic yard. Madden Dam was practically all mass concrete. The concrete stairway and parapets were more difficult and expensive to form and make than was the mass concrete in Madden Dam, and also more expensive and difficult to construct than the simple ramp and pipe handrail originally called for and specified.

86. October 19, 1934, plaintiffs protested and made claim to the construction engineer, claiming that the concrete in the concrete stairway and parapet should be classified and paid for under contract item 51, "Concrete in spillway bridge and in parapets on abutment section of Madden Dam," at $10 a cubic yard, as the unit item of work which most nearly applied to the character of work as changed and performed.

October 30, 1934, the construction engineer wrote plaintiffs denying their claim on the basis of his construction of paragraphs 118, 121, and 43 of the specifications as follows:

> You state that the concrete in the stairway and parapet in the north side of the Dam, which has been included in this Item [48], should be classified under Item No. 51. We call your attention to the fact that the portion of this stairway and parapet, which are above the elevation of the walkway, has been classified under Item No. 51, in accordance with paragraph 121 of the Specifications. The portion below the elevation of the walkway is correctly classified under Item No. 48, in accordance with paragraph 118 of the Specifications, which reads:
>
> "This item also includes all portions of the abutment sections to the abutment faces of the training walls, and below the elevation of the walkway, and the lateral extensions of the theoretical or regular abutment sections through or under the training walls to the river faces of the training walls; except that this item does not include the power penstock trash rack structure, as described in paragraph 122, or the powerhouse as described in paragraph 129."

The fact that the power penstock trash rack structure and the powerhouse are specifically excepted from this classification would certainly indicate that the ramp shown at the north end of the dam on the original plans (Dwg. 5137–59) was intended to be included in it and paid as Item No. 48. The change of plans to replace the ramp by a stairway and parapet is considered desirable and reasonable, as described in paragraph 43 of the specifications, and you are, therefore, entitled to no extra compensation other than that caused by any increase in the amount of concrete required.

November 5, 1934, plaintiffs appealed to the engineer of maintenance, as contracting officer, whose decision was as follows:

I can find nothing in your letter which would justify me in changing the decision of the Construction Engineer.

The change as ordered is considered to be a reasonable change covered by Paragraph 43 of the Specifications. Therefore, under this paragraph and paragraph 118, the unit price for this concrete is clearly included under Item 48.

Plaintiffs appealed to the Governor, whose decision was as follows:

From my review of this case, it seems clear that the concrete in question is properly payable under Schedule Item No. 48 of the contract for reasons described in letter to you from the Construction Engineer dated October 30, 1934. The decision of the Assistant Engineer of Maintenance is therefore sustained.

The concrete work required in the revised and changed plans and specifications compared very closely to and more nearly with the work covered by contract item 51. Paragraph 117 of the specifications provides in part:

* * * Any required concrete, for the works covered by these specifications, not definitely covered by an item of the schedule, shall be included for payment under the item of the schedule which most nearly applies as determined by the contracting officer: * * *.

87. If entitled to be paid for the work as changed under contract item 51, at $10 a cubic yard instead of as paid under

contract item 48, at $2.50 a cubic yard, there is a balance of $171.82 due plaintiffs for the placing of the 22.91 cubic yards of concrete required.

CLAIM 32. ASSESSMENTS FOR GROUT PIPES REPORTED STOPPED

88. Plaintiffs were required to place one-half-inch grout pipes in the contraction joints of Madden Dam. These pipes were vertical and 5 feet apart up and down stream and extended from the bottom of the dam to the top. It was contemplated to let the dam completely settle before grouting the contraction joints, in order to fill up any openings still remaining therein.

Paragraph 139 of the specifications reads in part as follows:

> * * * Great care shall also be taken to insure that all parts of the system are maintained free from dirt or any foreign substance whatever. After each grouting system is placed and the concrete around it completed and at such other times as the contracting officer may direct, the pipe shall be tested by forcing a current of air under pressure through it to the satisfaction of the contracting officer, after which it shall be immediately temporarily capped or otherwise closed to avoid the possibility of any foreign substance entering it until it is pressure-grouted. Any pipe that is found to be or becomes clogged due to any cause during the construction of the dam and before it is pressure-grouted, shall, if practicable, be cleaned or opened up to the satisfaction of the contracting officer. For any pipe which the contractor fails to open up or to replace to meet this test the contractor shall pay to the Government as fixed, agreed, and liquidated damages the sum of two dollars ($2) per linear foot of the total length of that pipe which is thereby made ineffective as determined by the contracting officer. * * *

From time to time the defendant caused tests to be made of the grout pipes by attempting to force water through instead of air as specified and required under paragraph 139 of the specifications set out above. On January 25, 1935, the construction engineer wrote to plaintiffs that 2,821.5 feet of grout pipes were ineffective. On January 31, 1935, plaintiffs appealed to the engineer of maintenance

who held that 1,213.6 feet were ineffective and assessed liquidated damages at the rate of $2 a foot, making a total of $2,427.20.

As to the actual number of feet of pipes that were ineffective the proof is indefinite and unsatisfactory. Some of the pipes held by defendant to be ineffective were found to be effective when the air test was applied; several of the pipes were ineffective, for the reasons hereinafter stated, when the air test was applied. The pipes that were ineffective were not rendered in that condition due to the negligence or fault of plaintiffs. Plaintiffs had properly capped the pipes to prevent them from becoming clogged or obstructed. The stoppages that remained were in the pipes which were installed prior to the time the construction engineer furnished the plaintiffs with copper grout stops and instructed them to install these grout stops across the *bottom* of the contraction joints to prevent the grout from the grouting of the foundations of the dam through other pipes from being forced through the seams of the rock up into the contraction-joint grout pipes. These stoppages were from the bottoms of the pipes and were caused by the grout being forced through other grout pipes into the foundations before these particular pipes were grouted, as directed by the construction engineer as the duly authorized representative of the contracting officer.

On February 18, 1935, plaintiffs appealed to the Governor, who denied the protest and advised plaintiffs as follows:

> After a careful study of your letter and our records in this case, I have to conclude that the decision of the Assistant Engineer of Maintenance is correct, and that liquidated damages must be assessed as indicated in his letter.
>
> The portions of pipe for which these damages are being assessed do not pass sufficient air to satisfy the contracting officer, as provided in the specifications.

CLAIM 33. DEDUCTIONS FROM PAYMENT FOR DRILLING GROUT HOLES 3-K AND 3-N

89. This claim involves the correct interpretation of paragraph 89 of the specifications. This claim differs from claim

11 in that the pipes, in claim 11, above the rock surface had become clogged with grout, whereas in the present claim two holes drilled into the rock had become partially clogged with grout in the same manner and for the same reason as stated under claim 11.

The grout holes 3–K and 3–N were those which had been drilled, but in respect to which defendant withheld $98.40 representing the contract price paid for drilling 32.8 feet which, to that extent, had become clogged with grout entering from the bottom. These holes became partially filled from grout seeping from other grout holes through seams and fissures in the rock below the dam, which was without fault or negligence on the part of plaintiffs. Plaintiffs had properly capped these pipes.

Plaintiffs protested the withholding of the payment of $98.40, claiming that their responsibility in maintaining grout holes free from obstruction had reference to foreign material entering the tops of the pipes. March 2, 1935, the Governor denied the claim for the following reason:

> It cannot be assumed, as appears to be the claim, that the contractor is freed of responsibility for protecting the grout holes from becoming clogged from below, and that his responsibility is confined to what enters at the top. Paragraph 89 is broader in its wording.

CLAIM 34. NONPAYMENT FOR CABLE RACK HOOKS AND CONDUIT CHANNEL SUPPORTS

90. The installation of electrical conduits required the installation of certain cable rack hooks and channel conduit supports, which were the means of attaching the conduits to the gallery walls within the dam. Contract items 82, 83, and 84 fixed the price of conduits on a linear foot basis; and contract item 93, "Installing miscellaneous metal work," was 10 cents a pound.

The contracting officer first classified and paid for these metal hooks and supports as miscellaneous metal work but, at the time of final payment under the contract, deducted from final payment the amount of $51.40 of the payment previously made.

Par. 156 of the specifications is in part as follows:

> * * * Payment for the work described in this paragraph will be made at the unit prices per linear foot bid in the schedule for placing the different sizes of steel and for placing the fiber conduit and fittings, which prices shall include the cost of installing all distribution and lighting cabinets, outlet and pull boxes, pipe hangers, clamps, and straps for the conduits. Payment for installing metal inserts, anchor bolts, and bolts for mounting conduit pipe straps and conduit racks, and for installing conduit racks will be made at the unit price per pound bid in the schedule for installing miscellaneous metal work.

On March 6, 1935, plaintiffs wrote the construction engineer claiming payment for the installation of hooks and supports for holding the electrical conduits under item 93, "Installing miscellaneous metal work" at 10 cents a pound. The construction engineer held that the hooks and supports should be paid for at the same price a foot as for the installation of conduits. These hooks and supports were in fact a part of the conduit racks.

If plaintiffs are entitled to payment under item 93, there is due them the sum of $51.40.

CLAIM 35. $12,831.03 FOR DEDUCTIONS MADE ON FINAL ESTIMATE FOR FINAL PAYMENT FOR (A) ROCK EXCAVATION, ITEM 6, (B) COMMON EXCAVATION, ITEM 5, AND (C) COMMON EXCAVATION OF CUT-OFFS WITH SIDE SLOPES FOR LEFT RIDGE AND SADDLE DAMS, ITEM 8

91. Paragraph 58 of the specifications reads in part as follows:

> * * * On written request of the contractor, made within ten (10) days after the receipt of any monthly estimate, a statement of the quantities and classifications between successive stations, or in otherwise designated locations, included in said estimate will be furnished the contractor within ten (10) days after the receipt of such request. This statement will be considered as satisfactory to the contractor unless specific written objections thereto with reasons therefor are filed with the contracting officer within ten (10) days after receipt of said statement by the contractor or the contractor's representative on the work. Failure to file such written

objections with reasons therefor within said ten (10) days shall be considered a waiver of all claims based on alleged erroneous estimates of quantities or incorrect classification of materials for the work covered by such statement.

Monthly estimates were determined and made by the contracting officer of quantities of excavation and other work on which monthly progress payments were calculated and made. Plaintiffs carefully checked these monthly estimates and if they believed any were incorrect they duly protested and where errors were admitted plaintiffs were paid on the estimates as corrected.

Before final payment was made under the contract, the contracting officer recalculated all quantities of work theretofore determined and estimated by him, checked and approved by plaintiffs and paid. In these recalculations on final estimate certain items of excavation were increased and three items making up the present claim—to wit: rock excavation, contract item 6; common excavation, contract item 5; and common excavation of cut-offs with side slopes for Left Ridge and Saddle Dams, contract item 8—were reduced, the net reduction being 4,223.22 cubic yards. The recalculation on final estimate, on the basis of which final payment was made under the contract, showed a lesser quantity of rock excavation, item 6, by 3,614.72 cubic yards which resulted in a reduction in payment of $11,032.03. The recalculation for common excavation, contract item 5, showed a reduction of 587.30 cubic yards which resulted in a reduction in payment of $880.95. The recalculation for common excavation of cut-offs with side slopes, contract item 8, showed a reduction of 21.20 cubic yards which resulted in a reduction in payment of $15.20. The total deduction on the final payment on account of these three items was $11,928.18. However, there were other decreases and also increases in prior monthly estimates, all of which resulted in a net reduction of only $8,342.34.

92. On March 5, 1935, plaintiffs wrote to the assistant engineer of maintenance acknowledging receipt of the final estimate on March 1, 1935, and requesting that the time for protest under paragraph 6 of the specifications be extended until March 16, 1935. The request was granted. No pro-

test was filed, and no further correspondence took place between plaintiffs and defendant on these claims. However, in the final release which plaintiffs executed in favor of the defendant on March 16, 1935, plaintiffs expressly mentioned these three items and reserved therein its right to further question the correctness, and such items were specifically excepted from the final release. The proof does not establish that the reduction of $11,928.18 or the net deduction of $8,342.34 made in the final estimate at the time of preparing final payment was erroneous.

CLAIM 36. CHARGES FOR CEMENT FOR FILLING IN ALLEGED OVEREXCAVATION

93. This claim relates only to cement used for filling an overexcavation on the upstream face of Left Ridge Dam. In preparing the upstream face of the earth fill on Left Ridge Dam for placing the concrete slope paving, the subcontractor overexcavated. Plaintiffs had been given a line and grade for the final trimming and the result of the work of trimming by the subcontractor was that more material was taken off than was necessary. The subcontractor decided that it would be easier to fill the depression with concrete at its expense than to put back earth and tamp it. This was done.

Paragraph 116 of the specifications provided in part as follows:

> * * * In the event cavities resulting from careless excavation, as determined by the contracting officer, are required to be filled with concrete, the materials furnished by the Government and used for such refilling will be charged to the contractor at their cost to the Government at the point of delivery to the contractor.

Plaintiffs were charged for the cement in the concrete used to fill the overexcavation. After calculation by defendant and protest by plaintiffs and recalculation by defendant, plaintiffs were charged and there was deducted from moneys otherwise due them the sum of $623.78 for the cost of 236.28 barrels of cement in filling the aforesaid overexcavation.

If entitled to recover the deduction made, there is due plaintiffs $623.78.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Under the 36 separate and distinct claims asserted, plaintiffs ask judgment in the total amount of $452,527.52. The material and essential facts established by the record are set forth in the findings separately with respect to every claim asserted under a title showing the nature and character of each claim made. The work called for under the contract in suit was extensive in character and amount, difficult of construction and performance, and involved the preparation of the site and foundations for the construction of a large concrete dam and appurtenant structure across the Chagres River, Canal Zone, Isthmus of Panama, and various earth and concrete dams on each side of the river. The work was of such character and was required to be performed and completed under such circumstances that it was necessary for plaintiffs to make a great outlay in money for construction, erection, and adaptation of plant and facilities to render them adequate and sufficient to perform the work as specified and definitely called for by the contract and the detailed specifications within 1,350 calendar days after receipt of notice to proceed. The entire work was completed and accepted within the agreed time. This was a unit price contract. The total contract price in accordance with plaintiffs' bids on the various units of work called for by the plans, drawings, and detailed specifications was based strictly on 95 separate and distinct units of work and estimated quantities specified in the contract and upon the 166 separate, distinct, and specific numbered paragraphs of the specifications which meticulously described the work required and how it should be done; all of these were prepared by the defendant and were required to be accepted and carried out by plaintiffs. The nature and character of each unit of work required to be performed was designated and specified by the defendant in the 95 original schedules under art. 1 of the proposed contract which was submitted to plaintiffs and upon which they made their bid. The dam was designed and the contract and detailed specifications were prepared by the defendant through the engineers of the

United States Reclamation Service. The specifications discussed generally and separately, and meticulously directed in great detail how each of the units of work called for was required to be performed and the basis of payment for each item of work, if and when performed strictly in accordance with such detailed and specific directions and instructions of the specifications. These specifications were a part of the contract between the parties. The contract and specifications authorized and provided for changes in the plans and specifications and called for an equitable adjustment in the specified unit prices if such changes caused an increase in the amount due under the contract. Reasonable changes in design or location which did not increase the costs of doing the specified units of work, but which might increase the amount of work to be done at the unit prices, were also authorized without payment in excess of the unit price for such work. Extra work orders for additional work not called for were provided.

At this point it should be stated that practically all the decisions and recommendations of the contracting officer and the head of the department in regard to practically all the claims in suit were based upon constructions which they placed upon certain articles of the contract and the specifications, rather than upon their findings upon disputed questions of fact. Plaintiffs in practically every instance duly and timely protested and appealed with respect to the claims here involved, which arose from (1) directions and instructions of the engineers and inspectors immediately in charge of the work; (2) rulings and orders of the construction engineer and written changes made and ordered by the contracting officer. The protests and claims were made to the construction engineer, to the engineer of maintenance, who was the duly authorized representative of the contracting officer and who acted as the contracting officer in the matter of protest; and, to the Governor of Panama, Canal Zone, who, in addition to being the official contracting officer, was the head of the department concerned. A few of plaintiffs' protests were not made within 10 days, but the contracting officer did not reject any of them on that ground but considered and decided them on the merits. By so doing he waived the

10-day provision. *Thompson et al.* v. *United States*, *ante*, p. 166. The contracting officer was expressly authorized to extend the time.

It should also be here stated, before discussing separately the various claims presented, that the construction engineer, the engineer of maintenance who, under proper authority, acted as the contracting officer, and the head of the department in each instance so far as the claims here made are concerned, and as is clearly established by the evidence, resolved all doubts strictly in favor of the Government and against plaintiffs in their rulings and decisions when interpreting various articles of the contract and specifications in connection with plaintiffs' protests and claims. In these protests and appeals plaintiffs claimed that under the instructions and orders given by the construction engineer and the contracting officer and under changes made and ordered in writing they were entitled, under the contract and specifications, to be paid for the extra expenses incurred by reason of being required to perform certain specified units of work in a manner different from and more expensive than that contemplated and specified in the contract and specifications. It is so well established as not to require citation of authority that in circumstances such as presented by this case, such manner and method of interpretation and construction of the contract and specifications by the defendant were erroneous and unauthorized. Where an instrument, especially one of such character as is involved in this suit, is drafted and prepared entirely by one party thereto, and is specific in its detailed requirements, subsequent doubts as to the meaning and applicability of the language and provisions thereof to definite facts, conditions, situations, and circumstances should not be interpreted and construed in favor of the party who drafted and prepared it, but, on the contrary, in such cases the provisions of such instrument should, in case of doubt and in such circumstances, be interpreted more favorably to the other party who did not and could not, in the circumstances, have anything to say as to the language and provisions of the instrument as prepared. The reason for this rule is that since the contract, the detailed drawings, and the specifications were not the result

of negotiations between the parties before execution it is only reasonable to presume that the party who prepared and wrote the contract, drawings, and specifications intended to express or clearly indicate his requirements in the language used rather than leaving them to be determined by resolving doubts and inferences in his favor.

Before discussing and deciding the several claims presented, reference will here be made to certain general provisions of the contract and specifications which relate directly or in some degree to a number of the claims involved. These, for the most part, are the general provisions which are found in practically all Government contracts and specifications. Other provisions which specifically relate to certain claims will be referred to and discussed in connection with the specific claim to which they are applicable.

Art. 3 of the contract, relating to changes, provided that the contracting officer might at any time by written order make changes in the drawings and/or specifications of the contract, within the general scope thereof; that if such changes caused an *increase or decrease in the amount due under the contract* an equitable adjustment would be made and the contract modified in writing accordingly; that no changes involving an estimated increase or decrease of more than $500 should be ordered unless approved in writing by the head of the department or his duly authorized representative, and that any claim by the contractor for adjustment under this article must be asserted within 10 days from the date the change was ordered, unless the contracting officer should for proper cause extend such time, and that if the parties could not agree upon the adjustment the dispute should be determined as provided in art. 15. This article was interpreted to mean that only "Extra Work Orders" under article 5 had to be approved by the head of the department.

Art. 15, relating to disputes, provided that, except as otherwise specifically provided, all disputes concerning *questions of fact* arising under the contract should be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within

30 days to the head of the department concerned, whose decision should be final and conclusive upon the parties as to such *questions of fact*.

Paragraph 6 of the specifications provided that if the contractor considered any work demanded of him to be outside the requirements of the contract and specifications, or considered any record or ruling of the contracting officer to be unfair, he should immediately request the contracting officer for his written instructions or decision, and that the contractor should furnish the contracting officer a written protest stating clearly the basis of his objections; and that unless the contractor furnished such written protest it would be considered that the contractor had accepted the instructions or decision of the contracting officer. It will appear from the consideration and discussion as hereinafter set forth that in a number of instances the contracting officer failed to comply with art. 3 and to perform certain duties required of him thereunder. He made and ordered a number of written changes in the original contract drawings which also operated to change the specifications (see art. 2), which changes caused obvious increases in the costs of performing the unit of work, as changed, over what the work as originally specified and called for would have cost. However, in making such changes, he seems to have given no consideration to the factual phase concerning increased costs, but assumed the right to order the changes without regard to increased costs thereof under the supposed authority of paragraph 43 of the specifications, hereinafter mentioned. On that ground plaintiffs' protests, claims, and appeals were denied. See *Newport Contracting & Engineering Co.* v. *United States*, 57 C. Cls. 581, 587. We think paragraph 43 did not in any way limit or modify the provisions of art. 3 of the contract, which required consideration and determination of increased costs resulting from changes and the making of an equitable adjustment on account thereof. A reading of art. 3 and paragraph 43 together will show that the latter was drafted with measured caution so as not to conflict with art. 3, and simply as a means and for the purpose of avoiding future claims for compensation at larger

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unit prices or for extra work at cost plus overhead and profit (art. 5 and par. 3), in respect to increased quantities of work reasonably to be expected as a result of information subsequently obtained as indicated, and of the type and character for which a unit price had been fixed. Paragraph 43 protects the contractor by specifying (1) the kinds of changes that may be made, (2) the basis therefor, (3) that they must be reasonable, that is, that they must be reasonably within the contract units of work and prices, and (4) that changes in design, location, dimensions, etc., which increase quantities of specified units of work, should not be extended unreasonably beyond the limits of the contractor's plant and operations without an equitable adjustment under art. 3.

Art. 5 of the contract provided that, except as otherwise provided therein, no charge for any extra work or materials should be allowed unless the same had been ordered in writing by the contracting officer and the price stated in such order; and paragraph 3 of the specifications provided as follows:

> The contractor shall, when ordered in writing by the contracting officer, perform extra work and furnish extra material, not covered by the specifications or included in the schedule, but forming an inseparable part of the work contracted for. Extra work and material will ordinarily be paid for at a lump sum or unit price agreed upon by the contractor and the contracting officer and stated in the order. Whenever in the judgment of the contracting officer it is impracticable because of the nature of the work or for any other reason to fix the price in the order, the extra work and material shall be paid for at actual necessary cost as determined by the contracting officer, plus 15 percent for superintendence, general expense and profit. The actual necessary cost will include all expenditures for material, labor, and supplies furnished by the contractor, and a reasonable allowance for the use of his plant and equipment, where required, to be agreed upon in writing before the work is begun, but will in no case include any allowance for office expenses, general superintendence, or other general expenses.

The defendant issued a number of extra work orders under which plaintiffs were paid for certain extra units of work,

which orders were in addition to the units of work called for and specified in the contract. Only 2 of the claims here involved relate to failure to pay under and in accordance with an extra work order. No defense is made to any claim in suit on the ground that it was "extra work" under art. 5 and paragraph 3, for which no extra work order was asked or issued. Practically all the claims, with respect to which plaintiffs were required to protest and make claim, grow out of specified units of work with respect to which change orders were made, or in connection with which plaintiffs claim they suffered increased costs and damages by reason of alleged unreasonable requirements and delay caused by the defendant.

Art. 6 of the contract provided that all material and workmanship should be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture or construction, and at any or all places where the work was being carried on. Plaintiffs were required to, and did, conform to and carry out the instructions and directions of the defendant's authorized engineers and inspectors immediately in charge of the various units of work.

Art. 18 of the contract provided that the term "contracting officer" should mean the duly authorized representative of the contracting officer. The engineer of maintenance under written authorization by the Governor of the Panama Canal Zone was made the contracting officer for the purpose of the contract, and the construction engineer was also authorized by the head of the department to act as the contracting officer in certain circumstances and under certain articles of the contract and specifications. The engineer of maintenance will hereinafter be referred to as "the contracting officer."

Paragraph 29 of the specifications gave a general description of the main dam and appurtenant structures with its various features, and paragraph 43, with reference to the right of the Government to change locations and plans, provided that whenever additional information relative to foundations or other conditions became available as a result of excavation work, further test drilling or otherwise, it might be found desirable to change the location, alignment,

dimensions, or design of the dams, power plant, or appurtenant works, to meet such conditions; that the Government reserved the right to make such *reasonable* changes as in the opinion of the contracting officer might be considered necessary or desirable, and that the contractor would be entitled to no extra compensation because of such reasonable changes, except that any increase thereby in the amount of excavation, concrete, or other work required, would be paid for at the unit prices bid and stated in the schedule under art. 1 of the contract; that the contractor's plant should be laid out and his operations conducted so as to accommodate any reasonable change in the location and design of the various works, or any part thereof, without additional cost to the Government. As hereinbefore stated, the contracting officer rejected and denied many of the protests and claims on the ground that the written changes in the drawings and specifications which were ordered, and which gave rise to the claimed increased costs and expenses, were governed by this paragraph of the specifications.

The rule is well established by the decided cases that in contracts of this character where, as in art. 15 abovementioned relating to disputes, it is provided that the decision of the contracting officer and the head of the department shall be final and conclusive only as to questions of fact, a decision or ruling on a protest or appeal which involves or is based upon an interpretation and construction of a contract and the specifications is a decision on a question of law rather than the determination of a fact and does not preclude the consideration, decision, and determination by the court of the question in controversy, including the facts. *Rust Engineering Co.* v. *United States*, 86 Ct. Cls. 461, 473. In *Davis et al.* v. *United States*, 82 C. Cls. 334, this court held that the competency of the parties to a Government contract to stipulate that the decision of disputed questions by the contracting officer of the Government, or by the head of the department on appeal, shall be final and conclusive is limited to questions of fact and, therefore, does not include questions involving construction of the contract which are questions of law. To the

same effect is *Lyons* v. *United States*, 30 C. Cls. 352, 353, 365; *Collins and Farwell* v. *United States*, 34 C. Cls. 294; *Albina Marine Iron Works, Inc.* v. *United States*, 79 C. Cls. 714. In *Rust Engineering Co.* v. *United States*, *supra*, this court held that "Under Art. 15 of the contract only decisions *as to questions of fact* by the contracting officer and the head of the department concerned, if an appeal was taken, were to be final and conclusive upon the parties. No appeal was required from any decision of the contracting officer, except as to questions of fact." In the instant case art. 15 required an appeal only from findings of fact by the contracting officer. With these observations, the several claims in controversy will be considered, discussed, and decided separately on their merit.

Claim 1. *$50,776.72 for expenses alleged to have resulted from flood damage caused by defendant by its clearing operations.*—This claim is one for unliquidated damage arising under an alleged implied obligation under paragraph 55 of the specifications. The facts established by the record with reference to this claim are set forth thereunder in findings 7 and 8. They show that certain towers of plaintiffs' gravel transportation system were wrecked and pulled from their foundations, resulting in serious damage to this cableway system as a result of large logs and debris being carried down the river by high waters from the defendant's clearing operations some distance above the site of the dam and above the location of the destroyed and damaged towers and system, and that the damage to the gravel transportation system was the direct result of this extra hazard over and in addition to the normal, expected, and anticipated hazards from floods in the Chagres River. This presents the question of law as to whether, in view of paragraph 55 of the specifications, plaintiffs can recover the damages sustained and represented by the cost of replacing and restoring the towers and the damaged portion of the loading plant, transportation cables, and large buckets.

Paragraph 55 provided, so far as material here, that "The contractor shall assume all risk of damage to his

plant, equipment, and operations at the gravel deposits, by reason of floods in the water courses adjacent to or through the gravel deposits." Paragraph 56 of the specifications also provided that "The contractor shall be responsible for and shall repair at the contractor's expense any damage to the foundations, dams, power plant, highways, or any parts of the work caused by floods, or water, or by failure of any part of the protective works."

The position of the defendant with reference to this claim is that the damage to the transportation system and the destruction of certain towers was not caused by the large logs and debris carried down the river by the floodwaters from the defendant's clearing operations but by the fact that the natural force of the floodwaters caused the collapse of the towers by reason of the concrete foundations thereof giving away, due to a scouring effect of the floodwaters. There is no competent or convincing evidence in the record to sustain this defense. There is some testimony in the record by certain of defendant's witnesses that because certain towers within the floodwaters were demolished and their concrete foundations pulled from their base and carried a short distance down the river, where they were found when the flood subsided, the collapse of the towers "must have been caused by the scouring effect of the floodwaters." But there is competent and convincing evidence in the record which we think clearly establishes that the loading plant and these towers were so designed and constructed as to withstand even somewhat more than the normal and expected consequences of any flood as great or even greater than had theretofore occurred in that river and that, except for the extra, unusual, and unanticipated hazard of the large logs and debris carried down from defendant's clearing operations, these towers would have withstood, without damage, the natural consequences of the flood and such debris as was in fact carried down from the jungle above the site of the dam. Other evidence in the form of photographs made immediately after the flood had subsided fully supports this testimony. These photographs show that there was no destructive scouring effect by the floodwaters at or in the vicinity where the destroyed towers were lo-

cated. They further show that a number of large logs up to 8 feet in diameter and 80 feet in length were entangled with portions of the destroyed towers and entwined and entangled with the steel transportation cables attached to the towers and held thus until the flood had subsided. Other logs from the defendant's clearing operations were also found held against plaintiffs' damaged gravel-loading plant at the same location.

We are of opinion that under a proper construction of the provisions of the contract above quoted, the plaintiffs should be held to have assumed only the natural and expected consequences of floodwaters in the Chagres River and that defendant cannot escape liability for the damage which was directly caused by its acts, or acts of its authorized agents, which added extra and unanticipated hazards to the normal and natural risk of danger which, under the language of the contract, the plaintiffs had assumed. The defendant, by its own employees, was carrying on certain clearing operations above the dam and, in addition, it was carrying on such operations through an agent in contract relation with it. The contracting officer under the clearing contract and plaintiffs' contract was the same person. The defendant's contract for the clearing operations above the site of the dam was made some time after plaintiffs' contract had been executed by the parties. Plaintiffs had the right to expect, and to place upon the above-quoted provisions of their contract the construction, that the defendant would not by any of its operations directly or through its agents add extra or unusual hazards to any flood that might occur, and which was reasonably expected by everyone would occur, in the Chagres River during the performance of this contract. In these circumstances and with full knowledge of the floods that had occurred almost every year, the plaintiffs only assumed the risk of damage by floodwaters and such debris from the jungle above that might be carried down by such floods, and, under the language of the contract, the defendant impliedly agreed to assume the risk of any additional hazards which it might add to the flood dangers. We think it is clear that the quoted provision of the contract cannot be construed to

place upon plaintiffs the risk of damage directly resulting from additional and unexpected hazards imposed by the defendant, whether or not they were imposed carelessly, accidentally, or otherwise. In *The Ohio River Contract Company* v. *United States*, 45 C. Cls. 542, 554, this court said:

> The assumption of responsibility by the claimant under specification 44, for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause, was not intended by the parties to include damage or injury resulting from the acts of the officers and agents of the United States, nor can the specifications be so construed.

While no implied contract arises solely from a tort, *Langford* v. *United States*, 101 U. S. 341, where the Government by a written contract requires the contractor to assume a risk of loss or damage occasioned by the natural consequences of a specified cause, it reciprocally and impliedly assumes an obligation not to interfere in such a way as to increase the hazard of the risk so assumed. "* * * What is implied in a contract, deed, will, or statute is as effectual as what is expressed (*United States* v. *Babbit*, 1 Black, 61). Human affairs are largely conducted upon the principle of implications." *Bulkley* v. *United States*, 19 Wall. 37, 40. *Miller* v. *United States*, 49 C. Cls. 276, 282; *Guastavino Co.* v. *United States*, 50 C. Cls. 115, 119. The case of *U. S. F. & G. Co.* v. *United States*, 53 C. Cls. 580, 581, is distinguishable.

The defendant and its agents engaged in the clearing operations above the site of plaintiffs' work were fully aware of the floods that had occurred and that probably would occur in the Chagres River during progress of plaintiffs' work and the defendant's officers and inspectors were at all times at the site of the clearing operations and were in a position, and it was their duty, to make sure that logs and trees were not permitted to be left where they would be carried down the river and cause damage to plaintiffs. The record in this case offers no excuse for failure of the defendant to do this or to see to it that its authorized agent did so.

The defendant also questions the claimed costs of repairing the damage. The record establishes and we have found

as a fact that the amount of plaintiffs' actual damage, represented by the actual cost of repairing and replacing damaged and destroyed portions of the gravel transportation system, including reasonable overhead expense, was $46,160.-55. The plaintiffs are entitled to recover this amount as compensatory damages.

Plaintiffs also claim the additional amount of $4,616.07 as reasonable profit of 10 percent upon the actual direct expense, but we are of opinion that plaintiffs are not entitled to recover any profit as an element of damage.

Claim 2. *$171,801.82 for extra and unnecessary expense alleged to have resulted and been caused by acts of the defendant in connection with the construction of Left Ridge Dam and other fills.*—Plaintiffs insist that the extra expense in the construction of Left Ridge Dam and certain other smaller dams making up the amount of this claim represents an expense in excess of that which it was required under the contract and specifications to incur in performing this phase of the work by reason of the facts that (1) the defendant required plaintiffs permanently to waste Madden Dam excavation performed in 1932 instead of using such excavation, as they insisted they had a right to do under the contract, in Left Ridge Dam and other fills; (2) the work of stripping the site of Left Ridge Dam was required by delayed orders of the defendant to be performed in a manner different from any contemplated or called for by the contract and specifications; (3) that the delay in making the change and the performance of extra preparatory work on such foundations delayed the time when the fill could otherwise have been commenced until after the excavation made from Madden Dam during 1932 had all been wasted; (4) the original contract plans and, therefore, the specifications for Left Ridge Dam and Saddle Dam No. 8 were so changed by the contracting officer as to require selecting, sorting, grading, hand-tamping, and blending of materials, none of which was required under the original plans and specifications; (5) the Left Ridge Dam and Saddle Dam No. 8 fills as finally constructed were entirely different from those specified in the original plans and specifications; and (6) the contracting officer and his duly au-

thorized representatives took almost a year to come to a decision as to what revisions, if any, they desired in the original plans and specifications, and the kinds of materials they wanted in the dams.

The facts establish that the work of constructing Left Ridge Dam and Saddle Dam No. 8, as it was required to be performed by the contracting officer, cost $152,061.69 in excess of what it would have cost had plaintiffs been permitted to perform the work at the time and in the manner as planned and as set forth in their original schedule of work which they prepared and submitted to the defendant in October 1931. The question presented is whether upon the facts disclosed by the record and the applicable provisions of the specifications, the contracting officer or his duly authorized representatives so interfered with the performance and progress of this work by requiring it to be performed in such a way, under such circumstances, and in such manner as was not contemplated by the contract and specifications as would entitle plaintiffs to recover the extra costs so incurred. Plaintiffs duly protested and appealed but the contracting officer and the head of the department refused their claim on the ground that the contract and specifications fully authorized them to require the work of preparing and constructing Left Ridge Dam and Saddle Dam No. 8 at the time, in the manner, and in accordance with the methods and with the material which had been finally specified by the contracting officer. It was therefore held that under the specifications, as so construed, there was nothing due and plaintiffs' protest and appeal were denied.

Paragraph 69 of the specifications entitled "Embankment construction, general" provided, so far as material here, as follows:

> For the purpose of these specifications, the term "embankments," includes the earth and gravel fill portions and the rock fill portions of the Left Ridge Dam and of all saddle dams, the earth blankets and filling immediately upstream from the Madden and the Left Ridge dams, the dumped rock riprap on the upstream slopes of saddle dams Nos. 8 and 5 * * *. Embankments shall be constructed to the lines and grades established by the contracting officer, which, in general, will be the lines

> and grades shown on the drawings increased by such heights and widths as determined necessary by the contracting officer to allow for later settlement. * * *. The suitability of all materials for construction of embankments shall be subject to the approval of the contracting officer * * *. Except as otherwise provided for highway embankments, all portions of required embankments, whether constructed from materials excavated for other required parts of the work, from borrow pits or from quarries, will be measured and paid for in embankment, and where the materials are excavated for other required parts of the work payment for placing the materials in embankments will be in addition to the payment made for the required excavation. * * * the unit prices bid for fills or embankments shall include the cost of excavating the materials in the borrow pits, of hauling the materials to the embankments and placing the materials as specified. It should be feasible to transport a large portion of the materials, which are excavated for other required parts of the work and which are suitable for embankment construction, direct to the embankments at the time of making the excavations. However, the contractor shall be entitled to no additional compensation above the prices bid for exacavation and embankments by reason of it being necessary or required, on any account, that such excavated materials be deposited in spoil banks prior to transporting to the embankments.

There were a number of embankments, other than those involved in this claim, which other specifications required be constructed.

It should be noted that this paragraph of the specifications was a general provision relating to embankment construction in general. There were other numbered paragraphs which related specifically and in greater detail to the Left Ridge Dam and Saddle dams.

Paragraph 74 of the specifications entitled "Earth Fill in Left Ridge Dam" provided, so far as material here, as follows:

> The earth-fill portion of the Left Ridge Dam shall consist of the natural mixture of clay, silt, sand, and gravel available from the foundation excavation for the Madden Dam from borrow pit CR-2, or from other approved borrow pits. Separation, sorting, blending, or segregation of the materials will be required only to

the extent that, in the case of power shovel or equivalent methods of excavation, the embankment materials shall be mixed and blended by the usual process of excavating against a vertical face and, in the case of team or equivalent methods of excavation, the loading shall be carried on simultaneously in different parts of the excavation yielding different kinds of materials, and that, regardless of the methods of excavation, the dumping of the successive loads from the different parts of the borrow pits or required excavation shall be in locations on the embankment as directed or approved by the contracting officer. * * * Measurement for payment will be made of the materials in place in the fill after compacting by moistening and rolling and after cutting back the upstream slope as specified. Payment for constructing the earth fill described in this paragraph will be made at the unit price per cubic yard bid in the schedule for earth fill in Left Ridge Dam.

Paragraph 75 of the specifications entitled "Earth fill in Saddle Dam No. 8" provided as follows:

> The earth-fill portion of Saddle Dam No. 8, including the fill in the cut-off trench on each side of the core wall, shall consist of the natural mixture of clay, silt, sand, and gravel available from the foundation excavation for the Madden Dam, from borrow pit CR–1, or from other approved borrow pits. All the provisions of paragraph 74, except those relating to the upstream 15 feet, covering the construction of the earth fill in the Left Ridge Dam shall apply to the construction of the earth-fill in Saddle Dam No. 8 * * *.

Paragraph 76 of the specifications entitled "Earth fill in Saddle Dam No. 5" provided as follows:

> The earth-fill portion of Saddle Dam No. 5, including the fill in the cut-off trench on each side of the concrete core wall, shall consist of the natural mixture of clay, sand, and gravel from borrow pit AC–1 or from other approved borrow pits.

Paragraph 77 of the specifications entitled "Earth fills in other saddle dams" provided as follows:

> The earth fill portions, including the cut-off trenches, of Saddle Dams Nos. 10 and 11 shall consist of the natural mixture of clay, silt, sand, and gravel available from borrow pit CR–1, or from foundation exca-

> vation for the Madden Dam, *if suitable, as determined by the contracting officer*, or from other approved borrow pits. The earth fill portions, including the cut-off trenches, of Saddle Dams Nos. 12 and 13 shall consist of the natural mixture of clay, sand, and gravel from borrow pit AC–1 or other approved borrow pits. The earth fill portions, including the cut-off trenches where these are required as shown on the drawings, of Saddle Dams Nos. 6, 7, 9, 14, 15, 16, and 17 shall consist of the natural mixture of clay, sand, and gravel from borrow pit CH–2 or from other approved borrow pits. [Italics supplied.]

Other provisions of the specifications having a bearing upon this claim were as follows:

> 60. *Stripping for embankments.*—The entire areas under the Left Ridge Dam, all saddle dams and the highway embankments, and the areas of all borrow pits, or portions thereof, approved by the contracting officer for embankment materials, shall be stripped or excavated to sufficient depth to remove all materials not suitable, as determined by the contracting officer, for the foundation of the embankments or for constructing embankments. The unsuitable materials to be removed shall include top soil, rubbish below the ground surface not removed in clearing and grubbing, stones and other materials which might interfere with the proper compacting of the materials in the embankments, or might be otherwise objectionable. These stripped materials shall be wasted or otherwise disposed of as directed by the contracting officer. Materials excavated in stripping will not be classified for payment. Measurement for payment for stripping will be made in excavation and will include only the stripping in locations and to the depths as directed or approved by the contracting officer. Payment for stripping, and disposal of materials wasted by stripping, as described in this paragraph will be made at the unit price per cubic yard bid in the schedule for stripping for embankments and borrow pits.
>
> 61. *Plowing foundations for embankments.*—After stripping, the entire foundations, except on exposed solid rock, for the Left Ridge Dam, saddle dams and highway embankments shall be scored with a plow making open furrows not less than 8 inches deep at intervals of not more than 3 feet and running approximately parallel to the axis of the dam or embank-

ment, the foundation of which is being plowed. Payment for this work will be made at the unit price per acre bid in the schedule for plowing foundations for embankments.

Throughout the performance of the work of constructing Left Ridge Dam, Saddle Dam No. 8, and other embankments, the defendant, upon plaintiffs' protest and otherwise, took the position that the general provisions of paragraph 69 of the specifications quoted above conferred upon the contracting officer and his duly authorized representatives full and complete discretion and authority in every instance to consider and determine whether, in his judgment, the materials from Madden Dam excavation or any source were suitable for use in Left Ridge Dam and Saddle Dam No. 8, or other embankments. Plaintiffs insisted from the beginning, and still contend, that inasmuch as paragraph 69 of the specifications was a general provision relating to embankment construction and paragraphs 74, 75, and 77 were special provisions relating directly to the earth fill in Left Ridge Dam, Saddle Dam No. 8, and other Saddle Dams in particular, these latter provisions would control if at variance with the general provisions of paragraph 69.

Defendant contends that it is impossible from the record to determine the amount of additional expense which plaintiffs incurred in performing the work, in connection with which this claim arises, in the manner and under the circumstances which they alleged, as compared to the amount it would have cost them had they been permitted to perform during the time and in the manner in which they allege they were entitled and should have been permitted to perform the work. But from a study of the record we think the additional cost is as stated in the findings. Defendant further insists that all the actions, rulings, and decisions of the contracting officer and his duly authorized representative were authorized by and in accordance with the contract and specifications.

With reference to the question whether plaintiffs were ready and prepared to begin making the fill for the Left Ridge Dam early in 1932 and substantially to complete it before the beginning of the rainy season in June of that

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year if the contracting officer had acted with reasonable promptness in the premises, the record establishes that before beginning Madden Dam excavation it was necessary for plaintiffs to build a road from the top of Left Ridge at about the point where the fill thereon, to make it a dam, would end, to the site of the main dam in the gorge. This was necessary, both for the purpose of placing excavating equipment at the work and for the purpose of providing means for transporting excavated material from the main dam. This road was commenced in December 1931 and was ready for use early in February 1932. Before beginning to make the fill on Left Ridge Dam it was necessary to have this road. It was constructed and ready for use about the time excavation was commenced on Madden Dam. It was also necessary for plaintiffs, before being permitted to place any material in Left Ridge Dam, to have the site for that dam stripped of top soil, shrubs, etc., under the provisions of the specifications. This was commenced in December 1931 and the stripping as called for by the original specifications was completed about April 20, 1932. A part of Left Ridge Dam had been stripped and, as the matter stood at that time, was ready for fill at about the time the road was completed and ready for use in February 1932, and excavation was commenced at the site of the main dam. Plaintiffs had planned, and such plan had been submitted to the contracting officer October 23, 1931, to build Left Ridge Dam from the 1932 Madden Dam excavation. Inasmuch as the facilities and the site of Left Ridge Dam were ready early in 1932, so far as plaintiffs were concerned they were then ready to carry on the work of excavating for the main dam and to transport and place such materials in the Left Ridge Dam as contemplated and provided by the specifications. Plaintiffs were unable to do this work at that time for the reason that they were prevented from so doing by the contracting officer. *McClintic-Marshall Co.* v. *United States*, 59 C. Cls. 817, 825–828. Although at that time, in February 1932, plaintiffs endeavored to secure the contracting officer's permission to proceed with the placing of Madden Dam common excavation in the fill of Left Ridge Dam, the contracting officer declined to

give such approval for the reason as hereinbefore shown. He could not then come to a conclusion as to the kind of a fill he desired or whether the foundation for the Left Ridge Dam as stripped up to that time, as required by the original specifications, was satisfactory to him for the placing of the excavated material thereon. See, *Levering & Garrigues Co.* v. *United States*, 71 C. Cls. 739, 757, 758. Early in 1932 the contracting officer concluded that the upstream portions of Left Ridge Dam and Saddle Dam No. 8 must be constructed of impervious material, and early in February of that year defendant's engineers in charge of this work informed plaintiffs that material excavated from Madden Dam and from borrow pit CR–2, if used would have to be mixed, but no instructions were given by the contracting officer or his authorized representative as to the kinds of materials desired or how they were to be mixed. The contract and specifications did not require portions of these dams to be constructed of *impervious material* and, as hereinafter stated, a board of consulting engineers from the Reclamation Bureau, the engineers of which bureau had prepared the specifications for Madden Dam and the appurtenant structures, decided that Madden Dam materials were ideal for Left Ridge Dam and should be used. However, the contracting officer did not permit it to be so constructed. The defendant was fully aware before the specifications were prepared and both parties were fully aware thereafter from the information disclosed on the original drawings with reference to the location and log of drill holes, that Madden Dam foundations to be excavated contained little, if any, clay or impervious materials. From this it is clear that the defendant and the contracting officer knew from the beginning that Madden Dam excavation, with little or no clay, would not be impervious. With this knowledge, paragraphs 74 and 75 specifically prescribed and authorized the use of Madden Dam excavation in Left Ridge Dam and Saddle Dam No. 8. The reason the original specifications did not require impervious materials in these dams was that the plans and specifications called for a concrete face on the upstream portion of the Left Ridge

Dam and a concrete core wall in Saddle Dam No. 8 (paragraphs 125 and 126 of the specifications) to make these dams watertight. Plaintiffs insisted that they had the right under paragraph 74 of the specifications to place the material from Madden Dam common excavation in the Left Ridge Dam without specially mixing the same with materials obtained elsewhere. At that time the contracting officer and his authorized representative not only refused to permit this to be done but they did not give instructions as to what would be acceptable. Instead it appears that the contracting officer left the matter to plaintiffs for experimentation with reference to materials placed in Left Ridge Dam and then to permit the defendant's engineers to make tests to determine whether the materials constituted an impervious fill. We think this was a violation of the contract and that it was clearly the duty of the contracting officer, if he intended not to permit the use of Madden Dam excavation in the fill, to give clear and specific instructions with reference to the materials and the placing of same inasmuch as the specifications specifically relating to the Left Ridge Dam stated that the earth fill portions thereof "shall consist of the natural mixture of clay, silt, sand, and gravel available from the foundation excavation for the Madden Dam, from borrow pit CR–2, or from other approved borrow pits." On April 19, 1932, plaintiffs in an attempt to bring forth some definite action or instructions from the contracting officer gave written notice that they were ready to begin making the fill for Left Ridge Dam. No instructions were forthcoming other than a letter and a drawing issued on May 23, 1932, designating permanent waste dumps for 553,000 cubic yards of common excavated material from Madden Dam, or sufficient room for all such excavation. While this letter did not in specific words *order* the plaintiffs to waste the 1932 Madden Dam excavation, it clearly shows beyond question that the contracting officer, acting through the construction engineer, had determined that none of this material was suitable or would be permitted to be used in the fill for the reason that he designated the place where the materials were to be dumped as

"permanent waste dumps." If he had intended the future use of any of these materials in the fill, it seems that he would have referred to the placing of same as temporary spoil banks, a term used in the specifications, rather than in "permanent waste dumps." Plaintiffs, although they were bound by this order, did not agree with it, and on July 7, 1932, which was after the rainy season of that year had begun, again endeavored, by dumping two loads of Madden Dam common excavation on the Left Ridge fill, to have the contracting officer give instructions as to how the Left Ridge Dam was to be constructed. The material was promptly rejected but no instructions were forthcoming from the contracting officer until July 16 when he ordered, through the construction engineer, further special preparation of foundations for the fill in Left Ridge Dam in addition to the preparation of those foundations as called for in the specifications. This further delayed the commencement of the fill. No reason appears why these instructions could not have been given at least six months earlier. These were the first instructions obtained by plaintiffs as to how this dam should be constructed. These instructions were somewhat vague and were subsequently changed from time to time as plaintiffs were required to experiment with defendant's engineers to determine how the fill should be constructed. This resulted in additional costs to plaintiffs.

On August 16, 1932, the construction engineer modified his previous decision with reference to the possibility of permitting the use of Madden Dam excavation in Left Ridge Dam and, at that time, expressed the desire that this excavation be stock piled on parts of CR-2 borrow pit material so that it could be mixed with CR-2 material. On the 19th the construction engineer made the "permanent waste dumps" previously established by him, and into which Madden Dam excavation had been wasted, temporary "stock piles for future operations." At that time the rainy season of 1932 was on and practically all the excavation of Madden Dam foundation that could be performed in 1932, until the river was diverted in 1933, had been done.

It was practically impossible to reexcavate and haul during the rainy season the Madden Dam material that had been wasted as above stated.

We think it is clear that it was the fault of the defendant rather than of plaintiffs that Left Ridge Dam was not ready to be constructed in 1932 and had to be constructed in 1933 at a considerably increased cost over what it otherwise would have cost. Plaintiffs were ready and desired to proceed early in 1932, and could have if defendant had acted with reasonable diligence. But the contracting officer did not decide and did not instruct plaintiffs how the dam should be constructed and, therefore, the work was delayed to plaintiffs' damage. *Callahan Construction Co.* v. *United States*, 47 C. Cls. 229, 233–235; *Monks, et al., Executors of Arnold*, v. *United States*, 79 C. Cls. 302, 338.

Notwithstanding the provisions of specification 74 dealing specifically with Left Ridge Dam provided that excavation from Madden Dam should be used therein, the defendant first decided that Madden Dam excavation could not be used in the fills and required it to be wasted in permanent waste dumps; second, in July it was decided that additional preparatory work was desired to be performed on the foundations before commencing the fills; third, in August it was decided that Madden Dam excavation could be used in Left Ridge Dam fill and that it might be stock piled for future use when specially mixed with other materials. We find no reason in the record or the specifications for indecision on the part of the defendant and the delay and additional expense thus caused the plaintiffs. In October 1932, after the contracting officer in July had refused to permit Madden Dam material to be used in Left Ridge Dam, a board of consulting engineers from the Reclamation Bureau, which bureau had designed these dams and written the specifications, came to the site of the work and made an investigation. As a result, this board of consulting engineers reported that "the materials encountered in the foundation excavation for Madden Dam are ideal for the Left Ridge Dam and should be used for this purpose." In other words, the designers of the dam and the draftsmen

of the specifications decided that an impervious fill was not required. Notwithstanding this, Left Ridge Dam was not constructed as indicated but it was constructed of material especially blended under changed and revised plans and specifications which were not issued by the contracting officer until January 3, 1933, almost a year after plaintiffs were ready and prepared to proceed with the making of this fill.

Plaintiffs were put to considerable extra expense due to the manner in which they were required to obtain the materials for Left Ridge Dam, and especially to mix and blend the same in order to make an impervious fill which the contract drawings and specifications show was not required, and were required to excavate a second time, a considerable portion of Madden Dam excavation which had been permanently wasted, which would not have been necessary had the contracting officer acted properly and with reasonable promptness. We think this work was in addition to that required by the specifications. Plaintiffs were paid only the unit prices specified in items 5, 17, 18, and 20 of the schedule in art. 1 of the contract. Item 5 related to common excavation for Madden Dam at $1.50 a cubic yard; item 17 related to earth fill in Left Ridge Dam at $1 a cubic yard; item 18 related to earth fill in Saddle Dam No. 8 at $1 a cubic yard; and item 20 related to earth fills in Saddle Dams Nos. 10 and 11 at $1 a cubic yard. In bidding these unit prices plaintiffs placed upon the specifications the interpretation for which they here contend and we think it a fair and reasonable one. We think the wasting of the Madden Dam common material when first excavated, the construction of the Left Ridge Dam of impervious material and the requirement of the contracting officer, in order that this might be done, that special materials be obtained from borrow pits and specially mixed and blended with reexcavated Madden Dam common or other borrow pit material were not called for by the specifications and that the contracting officer did not possess the unlimited authority to require these things to be done without compensating plaintiffs for the additional expense incurred in excess of that contemplated by the contract and the unit price bid for this work.

Defendant argues that paragraph 69, entitled "Embankment construction, general," gave the contracting officer the unqualified right to decide in every instance as to the "suitability" of all materials for construction of every embankment and that, therefore, he had the right to decide whether, in his opinion, common excavation from Madden Dam or from borrow pits was suitable material for all fills in Left Ridge and other dams. On this basis the contracting officer could have rejected all of the materials specified in paragraph 74.

Any authority granted to the contracting officer under the general provisions of paragraph 69 to decide as to the "suitability" of material was limited to those instances where the subsequent detailed specifications naming the materials the contractor could use, used the words "if suitable." We think the proper construction of the general provisions of paragraph 69 is that the contracting officer only had authority to decide what material should be used and whether it was suitable if the numbered paragraphs of the specifications which followed and dealt specifically, and in detail, with the fills, specifying the material to be used, contained the words "if suitable" or "if suitable as determined by the contracting officer," or "as directed by the contracting officer." In other words, the sentence in the general provision that "The suitability of all materials for construction of embankments shall be subject to the approval of the contracting officer" was not intended to give him that authority under subsequent specific paragraphs which specifically designated the different sources from which plaintiffs might obtain material, but which contained no provision that the materials so designated could only be used "if suitable." There are several reasons which support this construction.

Paragraphs 74 and 75, which dealt specifically with the fills for Left Ridge Dam and Saddle Dam No. 8, stated in specific language that "The earth-fill portion of the Left Ridge Dam (Saddle Dam No. 8) shall consist of the natural mixture of clay, silt, sand, and gravel available from the foundation excavation for the Madden Dam, from borrow pit CR–2 (CR–1), or from other approved borrow pits." The words "if suitable" are not found in this paragraph.

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The different sources from which material might be obtained were indicated for the reason that it was not then known whether there would be sufficient material from Madden Dam excavation to make the fills for these two dams.

Paragraph 77, entitled "Earth fills in other saddle dams," provided that Madden Dam excavation might be used *if suitable.* The reason for the distinction was that Left Ridge Dam and Saddle Dam No. 8 had concrete walls to make them impervious as prescribed by paragraphs 125 and 126 of the specifications. An impervious fill was therefore not necessary nor contemplated in the fill for Left Ridge Dam and Saddle Dam No. 8. The drawings so showed and the engineers of the Reclamation Bureau so determined. The other Saddle Dams specifically covered by paragraph 77 had no concrete face or core wall and, therefore, it was necessary to give the contracting officer full authority to determine as to suitability of material—that is, that he might require the use of impervious material. Paragraph 74 further specifically provided that "separation, sorting, blending, or segregation of the materials" to be placed in the fill for Left Ridge Dam and Saddle Dam No. 8 would be required only to the extent that in the case of power-shovel or equivalent methods of excavation the embankment materials should be mixed and blended *only* by the usual process of excavating against a vertical face or equivalent method. Plaintiffs' method of excavating Madden Dam satisfied this requirement. Throughout the specifications there appear numbered paragraphs which contain general provisions which are followed by numerous numbered paragraphs dealing specifically with the various matters referred to in the general provision. In every instance these special provisions repeat time after time, whether the work is to be performed or the material is to be used "as directed" or "as determined by the contracting officer," or "if suitable, as determined by the contracting officer." Where there are two clauses in a contract in any respect conflicting, the clause which is specially directed to a particular matter controls in respect thereto over a clause which is general in its terms, although within its general terms the particular may be included. This is so for the reason that when the parties express

themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in mind. *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551, 558; *Rodgers* v. *United States*, 36 C. Cls. 266, 278.

By requiring plaintiffs to construct the fills in the manner and of the materials hereinbefore indicated, the defendant obtained better and more expensive dams than the contract contemplated or called for, and plaintiffs are entitled to recover the reasonable and necessary extra expense established by the evidence. *Wood* v. *Ft. Wayne*, 119 U. S. 312; *Anvil Mining Company* v. *United States*, 153 U. S. 540; *J. Hampton Moore, Receiver*, v. *United States*, 46 C. Cls. 139, 173. Judgment will be entered in favor of plaintiffs for $152,061.69 on this claim.

Claim 3. *$75,233.99, alleged extra cost for spillway apron extension.*—This claim relates to certain items of work called for and required to be performed by plaintiffs under revised plans and drawings ordered in writing by the contracting officer for a 30-foot extension of the downstream concrete apron of the main dam. This change in accordance with the revised plans was ordered in writing by the engineer of maintenance as the contracting officer under art. 3 of the contract. Upon receipt of these revised plans and drawings, plaintiffs made request of the contracting officer that a change order be issued covering this work and were advised that the revised plans and the letter accompanying same constituted a change order. Thereupon plaintiffs inquired in writing as to what unit prices would apply to this work and were advised by the construction engineer, as the authorized representative of the contracting officer, that the changes were reasonable under paragraph 43 of the specifications, and therefore that the unit prices set forth in the contract for the original apron would apply. Plaintiffs protested this ruling in writing, claiming additional compensation over the unit prices for the original spillway apron for the performance of the work incident to construction of the 30-foot extension of the downstream spillway apron on the

ground that this was not a reasonable change under paragraph 43 but was more expensive, and asked additional payment over the unit price for such increased costs. The engineer of maintenance, acting as contracting officer under proper authority, ruled that the change ordered was a reasonable one and, on that ground, denied plaintiffs' claim stating that under paragraph 43 of the specifications the contracting officer had no authority to pay plaintiffs any increased costs for this work. On the basis of this construction of the specifications the contracting officer did not make any determination or findings of fact, and refused to consider the matter of any adjustment or modification of the contract under arts. 3 and 15. Plaintiffs did not appeal from this decision of the contracting officer to the head of the department. Paragraph 43 of the specifications provided as follows:

> *Right to change locations and plans.*—When additional information relative to foundation or other conditions becomes available as a result of the excavation work, further test drilling or otherwise, it may be found desirable to change the location, alignment, dimensions, or design of the dams, power plant, or appurtenant works, to meet such conditions. The Government reserves the right to make such reasonable changes as, in the opinion of the contracting officer, may be considered necessary or desirable, and the contractor shall be entitled to no extra compensation because of such changes, except that any increase thereby in the amount of excavation, concrete, or other work required, will be paid for at the unit prices bid in the schedule. The contractor's plant shall be laid out and his operations shall be conducted so as to accommodate any reasonable change in the location and design of the various works or any part thereof without additional cost to the Government.

Art. 3 of the contract referred to in the first part of this opinion prescribed the duties of the contracting officer when making changes. Art. 15 provided for the determination of facts by the contracting officer, subject to appeal by the contractor to the head of the department from such decision concerning questions of fact. Art. 5 related to "extra work" or orders. Paragraph 6 of the specifications related

to protest claim for work considered by the contractor to be outside of the requirements of the contract.

Three questions are presented under this claim. The first one is whether the change which added the downstream apron extension was a reasonable one such as would entitle plaintiffs to pay for such work only at the unit prices specified in the contract for the original downstream spillway apron, which was a part of the main dam. The second is whether the change called for work of such character as to call for an equitable adjustment under Art. 3 upon the basis of the determination of facts as to the necessary and unavoidable increased costs. The third one is the extra costs not contemplated by the contract to which the plaintiffs may be entitled.

It will be seen from this statement of the facts and the nature of the controversy between the parties that the matters involved required a determination of facts as well as an interpretation of the provisions of the contract and specifications. However, the contracting officer did not make any decision on the fact phase of the matter, but based his decision upon his interpretation of the applicable provisions of the contract and specifications that the change in the plans and specifications was a reasonable one and called for no payment for increased expenses in excess of the unit prices stated in the schedule under Art. 1 of the contract with reference to the work as originally called for. To that decision plaintiffs did not further protest and did not appeal from the ruling of the contracting officer to the head of the department. But Art. 15 only required an appeal from a decision of the contracting officer on questions of fact and, since the contracting officer made his decision upon an interpretation of the specifications rather than upon the determination of facts, failure to appeal does not preclude consideration of the question here. *Rust Engineering Co.* v. *United States*, *supra.*

Upon the facts we are of opinion that the construction of the apron extension was a reasonable and desirable change under paragraph 43 and that plaintiffs were properly paid for all items, except item (b), for which they were entitled to be, but were not paid at the proper unit price. The work

of constructing the extension was paid for at the unit prices fixed for the construction of the original apron and walls. Plaintiffs' increased costs, except items (b), (e), (g), and (h), were occasioned by the fact that their plant was not so constructed to permit the cableway for handling materials to reach beyond the original apron and walls which necessitated some rehandling. However, paragraph 43 provided that the plant should be so laid out and the operations conducted so as to accommodate any reasonable change of this kind without additional cost to the Government. Items (e) and (h) are covered by paragraph 56 of the specifications and are therefore not allowable. This paragraph provided that "The contractor shall construct and maintain all necessary cofferdams, flumes, * * * and shall install, maintain, and operate all necessary pumping and other equipment for unwatering the various sites of the work. * * * The cost of all work described in this paragraph shall be included in the lump-sum price bid in the schedule [$50,000] for diversion and care of river during construction and unwatering foundations, and no increase in this price will be allowed on account of any extra work or change in the location or designs of the dams, or other works, ordered under the contract." The proof does not establish that item (g) flood damage would have been avoided if this change had not been made. Paragraph 56 made plaintiffs responsible for this flood damage. Since this was a reasonable change this item would not be recoverable in any event. Under item (b) plaintiffs are entitled to recover $1,372.67 balance due for excavation of a cut-off trench under the apron extension change order. This was paid for as Madden Dam rock excavation when it should have been paid for at the unit price of $10 a cubic yard for "excavation for cut-off trenches."

Plaintiffs are entitled to recover $1,372.67 under this claim and judgment will accordingly be entered.

Claim 4. *$17,677.65, alleged to be due under paragraph 78 of the specifications for obtaining and placing earth fills for highways.*—The solution of this claim involves the application of the facts to the provisions of paragraph 78 of the specifications. The facts have been set forth in the findings

under this claim. This paragraph, which is also set forth in the findings, provided that the earth fills for both the main and branch highways, where these were not located on dams, should be constructed from required excavation for the highways at unit price, item 11, "common excavation for highways, $1.50 a cubic yard"; unit price, item 12, "rock excavation for highways, $2.50 a cubic yard" where the excavated materials are suitable: *Provided*, That the contractor should "not be required to use such excavated material when it is located on the opposite side of the river from the fill being constructed." This paragraph further provided that "Due to the disintegrating tendencies of the rock, in the excavation for the highways and in other required excavation in the vicinity of the highways, no highway fill shall contain any of this rock in an amount in excess of 35 per cent of the total volume of materials in the fill unless otherwise directed by the contracting officer." The contracting officer did not otherwise direct. The paragraph further provided that if there should not be sufficient suitable material available "from required excavation for the highways, additional materials shall be secured from other required excavation or from borrow pits approved by the contracting officer. Except as otherwise provided for materials on the opposite side of the river, the contractor shall move all required materials to the highway fills regardless of the length of haul." It also provided that the cost of constructing the earth fills for the highways, including the hauling of materials regardless of length of haul, and doing all work described in that article "shall be included in the unit prices per cubic yard bid in the schedule for excavation for highways or for other required excavation: *Provided*, That payment for excavating the materials used in these fills from approved borrow pits, if such materials are required, as determined by the contracting officer, will be made at the unit price per cubic yard bid in the schedule for common excavation for highways, in which case the materials will be measured for payment in excavation in the borrow pits."

Plaintiffs original plan was to use the required excavation from Madden Dam with which to construct this highway fill and to begin work thereon the latter part of August 1932

and, in the event the amount of material immediately and conveniently available was not sufficient to complete the proposed fill, to complete it during the next dry season in 1933 when the main channel excavation for Madden Dam would be open. Nothing was said in plaintiffs' letter to the construction engineer about extra payment for making this fill because it was not then known that the material would have to be secured from borrow pits or wasted Madden Dam common excavation on the opposite side of the river. August 19, the construction engineer wrote plaintiffs agreeing to their proposition. For some reason not clearly shown by the record, the work was not carried on as planned and the highway fill was not made until the spring of 1933. At the beginning of 1933 there was a considerable amount of Madden Dam common excavation which had not been excavated which was suitable for use in this highway fill. However, plaintiffs had to use this Madden Dam common excavation in the construction of Saddle Dam No. 8 referred to in Claim 2. Consequently there was no material available from Madden Dam or other required excavation for the highway fill and it was necessary for plaintiffs and they were therefore required to obtain the necessary material for making this highway fill from approved borrow pit CR–2 and from Madden Dam waste pile, both of which were on the opposite side of the river. The only approved borrow pits from which plaintiffs could obtain material were on the opposite side of the river from this highway fill. There were no borrow pits available on the side of the river where the site of the fill was located. In order to reach the fill from the only source of supply, it was necessary for plaintiffs to build, and they did construct a temporary bridge across the river.

The defense to this claim is that the contracting officer did not *order* plaintiffs to obtain the material, or any portion thereof, for this highway fill from a borrow pit or from the Madden Dam waste pile, but that he simply agreed with plaintiffs' proposal, made in 1932, to construct this highway fill from Madden Dam excavation. But we think in the circumstances that it was not necessary, in order for plaintiffs to become entitled to pay for the excavation *necessary* to be

made from a borrow pit and Madden Dam waste pile to obtain material with which to construct this fill, for them to be "ordered" to use this material. The contracting officer knew what was being done and consented. The facts establish that, except as to the 4,353 cubic yards of material obtained from Madden Dam waste pile, there was no required excavation material available which was suitable for the construction of this fill; that plaintiffs were, of necessity, compelled to obtain 7,432.1 cubic yards of material from an approved borrow pit in order to construct this fill. We think a proper interpretation of paragraph 78 is that plaintiffs could not be *required* by the contracting officer, without payment, to remove material for this fill from the opposite side of the river whether it was secured from "required excavation for highways" or "from borrow pits or other required excavation," and since it was *necessary* to excavate and remove the material from borrow pits on the opposite side of the river plaintiffs are entitled to payment therefor as provided in this paragraph. There were no approved borrow pits or any other source of obtaining suitable material on the same side of the river as the fill. The contracting officer held and defendant here contends that plaintiffs cannot recover because the prohibition in paragraph 78 against plaintiffs being required to transport material from the opposite side of the river applied only to "required excavation for highways" and plaintiffs did not transport such material across the river. But this construction gives effect to only part of the provisions of paragraph 78.

It will be seen from the above reference to paragraph 78 that the first sentence with reference to material that could be used and with reference to its transportation across the river concerned "excavation for highways" but later on the specification provided for the use of material from approved borrow pits or other required excavation if there was not sufficient suitable material available from required excavation for highways. There was not such suitable material. Following this provision the specification again made an exception with reference to material on the opposite side of the river, stating that "Except as otherwise provided for materials on the opposite side of the river,

the contractor shall move all required materials to the highway fills regardless of length of haul." By this exception which immediately followed the provisions with reference to the use of materials from borrow pits or other required excavation, other than "excavation for highways," the paragraph made the *proviso* applicable also to the materials last mentioned, and we think it was clearly so intended for no reason can be perceived why the prohibition should apply to "excavation for highways" on the opposite side of the river and not to necessary borrow pit excavation also on the opposite side of the river from the fill being made.

The amount to which plaintiffs are entitled in the circumstances for the material excavated from the borrow pit for use in this fill under paragraph 78 of the specifications (7432.1 cubic yards at $1.50 a cubic yard) was $11,148.15. Judgment will accordingly be entered for this amount.

Claim 5. *$21,617.70 for rock excavation for Madden Dam cut-off trenches; unit price item 7 of the schedule.*—Art. 1 of the contract provides for payment at $10 a cubic yard for "rock excavation of cut-off trenches for Madden Dam." Paragraph 29 of the specifications contains a general description of Madden Dam and, among other things, states that "Excavation for the base of the dam will be carried well into solid rock, and a cut-off trench will be excavated below the upstream heel." Paragraph 65 of the specifications, entitled "Excavation of Madden Dam cut-off trenches," deals specifically with this item of work and specifies the basis of measurement for the purpose of payment as follows:

> Cut-off trenches shall be excavated under the upstream toe of the Madden Dam, the upstream edge of the upstream concrete aprons, under the downstream edge of the spillway apron, and under the downstream edge of the tailrace floor. The provisions of paragraph 63 relating to care in excavation, and the provisions of paragraph 64 relating to cavities caused by careless excavation, shall apply in the excavation of these trenches. Excavation of the cut-off trenches covered by this paragraph will be measured for payment to the actual excavated lines, as approved by the contracting officer, below the general level of the adjacent completed excavated surfaces, and payment therefor will be made at the unit price bid in the schedule for rock excavation of cut-off trenches for Madden Dam.

The facts show that the trench at the upstream heel of the dam was between the completed exacavated surface for the upstream apron and the completed excavated surface for Madden Dam foundation; that the surface of the upstream apron was in most cases higher than the surface of the completed excavated surface for Madden Dam foundation. The trench at the downstream toe was between the excavated surface for the spillway apron extension and the completed excavated surface for the concrete apron below the spillway; the excavated surface for the apron below the spillway was higher than the excavated surface for the spillway apron extension. In other words, the completed excavated surfaces adjacent to the cut-off trench at the upstream heel were not on the same level, and the same is true of the cut-off trench at the downstream toe. We think it is clear that the provision of par. 65 requiring that the excavation of the cut-off trenches be measured for payment to the actual excavated lines below the general level of the adjacent completed excavated surfaces meant and could only mean a line projecting from one surface to the other and that the contracting officer and the head of the department clearly misconstrued the contract when they measured the excavation for the cut-off trenches by projecting a horizontal line through the intersection of the excavation line for the base of the dam, with the line of the downstream face of the cut-off trench excavation. In each instance the contracting officer measured the excavation for purposes of payment at the contract price a cubic yard below the lowest adjacent surface which left 3,133 cubic yards of rock within the line of the cut-off trenches between the two surfaces which plaintiffs were required under the contract to excavate as a part of the cut-off trench, for which the defendant did not pay them. The contract price for this yardage was $21,617.70, which plaintiffs are clearly entitled to recover.

Defendant contends that the only material for which plaintiffs can be paid, as for cut-off trenches, must be in that portion of such cut-off trenches as is under the upstream heel of Madden Dam and under the downstream toe, and that payment claimed by plaintiffs for the triangular portion of the cross section which plaintiffs had to excavate

as a part of the cut-off trenches cannot be made because it was not under but above the upstream heel of the dam and under the downstream edge of the spillway apron. The word "under" as used in the specifications clearly had reference to the trench as a whole, which certainly was under and not above these surfaces. The basis of payment specified in the contract was that the rock necessary to be excavated by hand to provide for these trenches should be measured for payment below the general level of the adjacent completed surfaces and not, as the defendant contends, below the lowest adjacent surface.

Judgment will be entered for $21,617.70 on this claim.

Claim 6. *$25,995.56 for slope payment, common excavation.*—Plaintiffs were paid at the unit price for the common excavation specified in the contract on the basis of a slope of 1 to 1 and a 1-foot berm for common excavation and ¼ to 1 for rock excavation. Plaintiffs duly protested and appealed, and claimed pay at the contract unit price under paragraph 62 of the specifications on the basis of a claimed practicable slope of 2 to 1 and a 10-foot berm as necessary for common excavation because it was necessary to have this slope and berm in order to avoid cave-ins, danger to workmen, and to permit progress of the work. The contracting officer and head of the department refused to stake out a practical slope and berm for common excavation and when they considered and decided plaintiffs' protest, appeal, and claim for payment, they gave no consideration whatever to the matter whether a slope of 1 to 1 and a 1-foot berm would stand or was practicable, holding that they were bound to pay only on the basis of a slope of 1 to 1 and a 1-foot berm. We think these decisions were erroneous. The contracting officer and the head of the department admitted that the common material would not stand on a 1-to-1 slope. Paragraph 62 of the specifications provided as follows:

> Except as otherwise provided for definite features of excavation in these specifications or shown on the drawings, excavation will be measured for payment to slopes of 1 to 1 for common excavation and ¼ to 1 for rock excavation, and in the case of excavation for structures, to lateral dimensions 1 foot outside of the foundations

> of the structure; * * * *And provided further*, That for any structure or open cut where, in the opinion of the contracting officer, the conditions warrant, the excavation will be measured for payment to the most practicable dimensions and lines as staked out or otherwise established by the contracting officer. * * *

The original contract drawings for upstream common excavation showed a slope of 1 to 1 and a 1-foot berm and the same drawings showed the slope and berm for pay purposes at the toe of the spillway apron of 3 to 1 with a 23-foot berm. When the spillway apron extension was added, this drawing for the downstream excavation was revised but it still showed a 3-to-1 slope and a berm of about 23 feet. Later the contracting officer further revised this revised drawing and changed the pay lines for common excavation to a 1-to-1 slope and a 1-foot berm. The material encountered, both upstream and downstream at the toe of the spillway apron as extended was the same and would not stand on a 1-to-1 slope. A berm of only 1 foot was not practical and was dangerous to workmen, in that it did not give sufficient room between the bottom of the common excavation and the deep rock excavation below. A 2-to-1 slope and a 10-foot berm was practical and, in excavating to such slope and berm, plaintiffs were required to excavate 17,330.37 cubic yards of common excavation, the difference between an impractical slope measured 1 to 1 with a 1-foot berm and a practical slope of 2 to 1 with a 10-foot berm. We think plaintiffs were and are entitled to be paid for this excavation at the contract rate of $1.50 a cubic yard, or $25,995.56. Paragraph 62 above quoted did not specifically require payment in all events on the basis of a slope of 1 to 1 with a 1-foot berm for common excavation, but only in the event (1) that the contract drawings did not show otherwise and (2) in the event that such slopes were found not to be practical when the work was being done, in which later event it was the clear duty of the contracting officer to stake out the slope and berm to which the excavation should be made as a practicable matter and to measure the excavation for payment under the most practicable dimensions. The contracting officer refused to per-

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form his duty in the premises, and it becomes the duty of the court to determine the matter upon the evidence. *Newport Contracting & Engineering Co.* v. *United States*, 57 C. Cls. 581, 586, 587. Not only this, the contracting officer changed the original contract drawings which showed a slope of 3 to 1 and a 23-foot berm as the pay line for the excavation at the toe of the spillway apron to a slope of 1 to 1 and a 1-foot berm which was correctly shown by the evidence and was known by the contracting officer at the time to be an impractical slope and berm. Plaintiffs are entitled to recover the amount claimed at the contract rate for the material which they were required to excavate to the practical dimensions of 2 to 1 and a 10-foot berm.

Claim 7. *$4,901.07 alleged to be due by and collected from plaintiffs by the defendant for cement alleged to have been wasted.*—The only question involved in this claim is whether under the facts set forth in the findings and the proper interpretation of paragraph 101 of the specifications the plaintiffs should have been charged with any sum on account of the small amount of cement wasted under the circumstances disclosed by the record. We think it is clear that the charge was unwarranted and unauthorized. In the first place the record clearly establishes that no cement was wasted because of any carelessness on the part of plaintiffs and that the amount of the cement wasted was far less than the normal, anticipated, and expected wastage on a project of the magnitude of Madden Dam. The defendant's expert engineer of long experience in concrete work of this character, who was in direct charge of all the concrete work on this project, so testified. His testimony is supported by other competent evidence and is not refuted by the defendant's evidence.

In the second place paragraph 101 of the specifications when properly interpreted contemplated and recognized that in a project of this magnitude there would obviously be some wastage of cement. For that reason the specifications provided that plaintiffs would be charged with any cement that was damaged or wasted "due to carelessness" by plaintiffs. The evidence shows beyond doubt that none of the cement with which plaintiffs were charged was wasted as

a result of any carelessness on the part of plaintiffs or its employees. The plaintiffs cannot be charged for any cement lost or wasted because of compliance by plaintiffs' employees with instructions of the defendant's authorized inspectors. *Moore* v. *United States*, 46 Ct. Cls. 139, 172. In the third place plaintiffs could not under the specifications be charged with and required to pay the defendant for 1,924.295 barrels of cement which represented the amount lost on the entire project, for the reason that this amount of cement was far less than the 2,483.99 barrels which the defendant received from the manufacturer, for which the defendant did not pay. This last-mentioned amount of cement which the defendant received in excess of the number of barrels bought and paid for resulted from the manufacturer placing in each bag a pound or two extra in order that no bag should subsequently be found to be underweight. Paragraph 101 of the specifications provided that the contractor should be charged in case of negligence but that the charge should only be for the "cost to the Government" of the amount of cement wasted. Since the Government received the full benefit in the work of the entire amount of cement for which it paid, plaintiffs cannot be made to pay the Government a profit on the cement which was unavoidably wasted, but which was received by the Government without cost.

Judgment will therefore be entered for $4,901.07 on this claim.

Claim 8. *Payment for concrete placed in test pits.*—The only question involved in this claim is the construction of extra work order No. 2 of January 13, 1933, in the light of the evidence as to the agreement between the parties as a result of which this extra work order was issued. Extra work order No. 2 is set forth in the findings under this claim. Unit of work item No. 54 in art. 1 of the contract provided for payment for the "concrete in counterforted wall" at $20 a cubic yard. A test pit was necessary and under an "extra work order" was excavated in the foundation of this wall which, as a part of the counterforted wall, had to be filled with concrete. For this work, about which there is no dispute, plaintiffs were entitled under item 54 and paragraph 124 of the specifications to payment for the con-

crete placed in this test pit in constructing the counterforted wall at the rate of $20 a cubic yard. Paragraph 124 provided that this item of the schedule, "Concrete in counterforted wall, includes all concrete in the counterforted retaining wall at the right abutment of the Left Ridge Dam. Concrete in the counterforted wall shall be placed in horizontal layers not exceeding 5 feet in thickness." The defendant's construction engineer proposed to plaintiffs that the concrete placed in the test pit under the counterforted wall, which under the contract was a part of such wall, be paid for by the defendant at a unit price of less than $20 a cubic yard. The work of properly cleaning and preparing open pits and wells for the placing of concrete therein is more difficult and expensive, and more care is required than in placing mass concrete on ordinary foundations. To the proposal of the construction engineer, plaintiffs expressed a willingness to agree to a reduction of the unit price of $20 a cubic yard for placing concrete in the test pit in the counterforted wall if the change order would be made to apply to all open pits, test wells, and other depressions where such open pits and test wells were required by the defendant. The construction engineer proposed a unit price of $7.50 a cubic yard for concrete filling in open pits, test wells, and other depressions, which price, instead of the unit price of $20, would apply to the test pit under the counterforted wall then under consideration. Plaintiffs agreed with this understanding, that the unit price would apply to all test pits and wells where required and directed by the defendant. Subsequent to the making of this extra work order No. 2, the contracting officer directed, and required as extra work, the excavation of certain test pits in the foundation of Madden Dam, but when the time came for payment for the placing of concrete in these test pits the contracting officer refused to pay the unit price of $7.50 specified in extra work order No. 2 and paid for the placing of such concrete at $2.50 under unit work item No. 48, in art. 1 of the contract, as for "Concrete in Madden Dam." The work and care necessary to place the concrete in these tests pits were exactly the same as that of placing concrete in the test pit under the counterforted wall. Extra work

order No. 2 was the result of an agreement without which the contracting officer was without authority under the contract to reduce the contract price from $20 for the concrete placed in the test pit in the foundation of the counterforted wall to $7.50. In the light of the language of the extra work order and the unrefuted testimony as to the basis of plaintiffs' agreement to the terms thereof, there can be no doubt under the plain language of the order, the substance and extent of which are contained in the first two paragraphs thereof, as to the right of plaintiffs to be paid for the concrete placed in the test pits excavated under the foundation of Madden Dam at the rate of $7.50 a cubic yard. These two paragraphs of the change order are as follows:

> In accordance with Article 3 of your contract PClp-201, dated September 14, 1931, you are hereby directed to place Concrete Filling in Open Pits, Test Wells, and other Depressions where required and directed by the contracting officer and where the concrete is not of any class or in any situation covered by any other concrete item in the schedule.
>
> This will be added to the schedule as "Item No. 97, Concrete Filling In Open Pits, Wells, Etc.," unit price seven dollars and fifty cents ($7.50) per cubic yard.

Under this language the order and the unit price stated therein cannot be limited only to the test pit excavated for the counterforted wall. The last paragraph of the order quoted in the findings, which relates only to the filling of the test pit in the counterforted wall then under consideration, cannot be interpreted so as to limit the price of $7.50 to the filling of such test pit in the counterforted wall. The amount to which plaintiffs are entitled for placing the concrete in other test pits required and directed by the contracting officer at $7.50 a cubic yard is $1,284. Judgment will be entered in favor of plaintiffs in this amount.

Claim 9. *$7,532.34 for extra rock excavation.*—The facts with reference to this claim are set forth in the findings. It is sufficient here to state that the amount represents the cost of certain rock excavation by hand, due to unforeseen conditions which were encountered, in excess of the rate of $3.10 a cubic yard for general rock excavation. Plaintiffs

and the contracting officer, and also the head of the department, agreed that the extra expense of this excavation was $2.18 a cubic yard in excess of the contract rate of $3.10 and that, because of the manner in which the work had to be performed due to unforeseen conditions encountered, plaintiffs should be paid such excess cost. The head of the department submitted the matter to the Comptroller General for authority to make payment and the Comptroller General concluded that plaintiffs were not entitled to any extra payment and refused to authorize the contracting officer to proceed. The contracting officer and not the Comptroller General was the one who had authority to decide whether plaintiffs were entitled under the circumstances to this extra cost. Judgment will be entered in favor of plaintiffs for $7,532.34.

Claim 10. *$2,104.40 for 210.44 cubic yards of concrete in upstream aprons in excess of the amount for which plaintiffs were paid.*—The facts and pertinent provisions of the specifications with reference to this claim are set forth thereunder in the findings. Upon those facts plaintiffs are entitled to recover. The contracting officer simply failed to comply with paragraph 123 of the specifications in making his measurements for payment of the concrete placed in the upstream aprons. The contract provided for the placing of concrete in aprons on the right and left abutments on the upstream side of Madden Dam. Before such concrete was placed, the rock was excavated to the lines and grades as directed by defendant. The finished surface of the rock was irregular caused by the removal of rotten and weather-beaten rock in order to obtain a solid foundation. This left the surface of the foundations rough and with deep holes at certain points. The defendant approved and accepted this surface as so provided, and in these circumstances if plaintiffs had made further excavation for the purpose of providing a more uniform surface it would not have been paid therefor.

Anchor bars were placed at heights as directed by the defendant to the tops of which were fastened reinforcing mats as directed and concrete was placed so as to come three

inches above the reinforcing mats. All space below a point three inches above the mats had to be filled with concrete, and in measuring for payment the contracting officer did not give proper consideration to the depressions in the surface of the foundation on which the concrete was placed in determining, as he construed paragraph 123, the average thickness for such purpose. The provision in paragraph 123 of the specifications that "If the open-cut excavation upon or against which the concrete is to be placed is made to greater dimensions than necessary for placing the prescribed average thicknesses of concrete, the excess spaces shall be solidly filled with concrete" and that the entire expense of such filling shall be borne by the contractor, except that no charge should be made for cement, did not justify the contracting officer in not taking into consideration the holes or depressions, since the defendant approved and accepted the excavation as made, which was necessary to provide a proper foundation and defendant also controlled the actual thickness of the concrete by fixing the heights of the anchor bars and mats. If it be regarded that in this instance the contracting officer made any decision of facts, his decision was arbitrary and so grossly erroneous as to imply bad faith.

Judgment will be entered in favor of plaintiffs for $2,104.40 for the 210.44 cubic yards of material placed in excess of the amount for which payment was made.

Claim 11. *$1,200.80 for drilling grout holes through concrete which entered and hardened in certain grout pipes.*—Upon the facts disclosed by the record and set forth in the findings, we are of opinion that plaintiffs are entitled to recover on this claim. The contracting officer and the head of the department denied the claim on their construction of paragraph 89 of the specifications. We think their interpretation was erroneous and unjustified. They construed the specifications more favorably to the defendant and strictly against plaintiffs in violation of the rule mentioned in the first part of this opinion. They based their decision against plaintiffs on the provisions of paragraph 89 which provided that "Each hole [after the pipe is

placed] shall be protected from becoming clogged or obstructed by being suitably capped or otherwise protected until it is grouted and any hole becoming obstructed before it is grouted shall be opened up to the satisfaction of the contracting officer by and at the expense of the contractor." They construed this as requiring plaintiffs to open up the pipes at their own expense, notwithstanding the pipes had been suitably capped and otherwise protected from becoming clogged or obstructed from any source other than from grout forced into other pipes as directed by the defendant. The defendant did not permit plaintiffs to drill all the grout holes before the grouting was done and did not permit plaintiffs to grout the holes at the same time. As a result, certain of the pipes in which the grout holes had not been drilled became filled with grout from the seams in the rock underneath when other pipes and drilled holes were grouted. The drilling of holes through hardened grout in the pipes in which holes had not been drilled prior to the time the grout from other holes had found its way into such pipes was just as expensive and difficult and required as much time and effort as the drilling of the holes in the rock beneath the pipes. In our opinion the language of paragraph 89 meant only that plaintiffs should be required at their own expense to open up the grout pipes if they should become obstructed or clogged from the top because not suitably capped or the opening otherwise protected. We think this is clear enough from an unbiased reading of the specification which plainly states that the hole through the pipe, if drilled, or the pipe, if the hole in the rock has not been drilled, shall be protected from becoming obstructed *by being suitably capped.* A reading of paragraphs 91, 93, and 139 of the specifications supports this construction of paragraph 89. The grout pipes were required to be firmly and securely set three inches in the rock before the mass concrete was placed around them and before the grout holes in the rock beneath should be drilled. It was not plaintiffs' fault that certain pipes became obstructed by grout and that such grout hardened therein before it was discovered. This resulted from the manner in which the defendant required plaintiffs to drill the grout holes and inject the grout.

Judgment will be entered in favor of plaintiffs for $1,200.80 as claimed.

Claim 12. *$600 for smoothing bituminous enamel applied to sluiceways.*—The amount of this claim represents extra and unnecessary costs incurred by plaintiffs in performing certain extra work under this claim, as set forth in the findings, as a result of hot bituminous enamel being applied to the metal lining of the sluiceways in the manner directed by the defendant, over the objection of plaintiffs. Plaintiffs suggested and asked permission of defendant's authorized inspector to have this hot bituminous enamel applied from the top down, but they were directed to apply it from the bottom up, which was done, with the result that certain of the hot material when applied ran down over the lower surface to which such enamel had been applied; this resulted in the surface to which the enamel had been applied in such manner being rough when the application had been completed. Thereupon the contracting officer required plaintiffs to smooth the surface by the use of hot irons, to which plaintiffs objected unless paid for the additional cost of so doing. The contracting officer refused to issue an extra work order and ordered plaintiffs to perform the work, which they did. *Sollitt & Sons Co.* v. *United States*, 80 C. Cls. 798, 808, 809. They duly protested and made claim for the increased expense of $600 which was denied by the contracting officer and the head of the department on the ground that plaintiffs were required to perform the work to the satisfaction of the contracting officer. In these circumstances we think it is clear that plaintiffs are entitled to recover, and judgment will be entered in their favor for $600.

Claim 13. *$1,768.38, balance alleged to be due under unit-price item 68 for installing sluicegate cylinders.*—Upon the facts disclosed by the record and set forth in the findings, the plaintiffs are not entitled to recover on this claim. The specifications and drawings properly interpreted make it clear that the hydraulically operated cylinders, for which plaintiffs were paid at 1¼ cents a pound and for which they claim payment at 10 cents a pound, were a part of the "High-pressure, hydraulically operated gates" mentioned in paragraph 142 of the specifications rather than the "Con-

trol apparatus for high-pressure gates" mentioned in paragraph 143. Plaintiffs were properly paid, and nothing further is due.

Claim 14. *$249.62, alleged excessive charge for cement furnished by the defendant from the Panama Canal warehouse.*—In view of the facts and circumstances disclosed by the record and set forth in the findings, we are of opinion that the defendant was in error in making this charge against plaintiffs. It was as much to the advantage of the defendant as to plaintiffs to have the work progress as rapidly as possible. It was for the benefit of defendant that a time limit was placed upon the completion of the work. Unanticipated circumstances resulted in the defendant furnishing plaintiffs with certain cement which it had in its warehouse at the Panama Canal, by reason of the fact that plaintiffs had used all the cement which they had received in the last shipment. Paragraph 40 of the specifications provided that the defendant would furnish the cement necessary for construction of the work called for and there is nothing in the contract which provides that such cement would be furnished by the defendant from its warehouse or otherwise. There is no provision in the contract that if the defendant furnished cement from its warehouse that plaintiffs would be subject to a warehouse charge therefor, and we find no basis in the contract or specifications for any implied agreement to this effect. Plaintiffs did not agree to the imposition of such a charge, and if the defendant did not desire to supply this cement under the circumstances it was at liberty to wait until the next shipment arrived. It elected to furnish the necessary cement to permit the work to proceed. The specifications, when reasonably and properly interpreted, authorized and permitted it to supply the cement in the manner described without making any charge against plaintiffs therefor. In fact, we are of opinion that the contracting officer was without authority to impose such charge.

Judgment will be entered in favor of plaintiffs on this claim for $249.62.

Claim 15. *$367.97 for extra costs occasioned by extra work required by a change ordered in the construction of a parapet*

wall for Saddle Dam No. 8.—The original contract drawings for this wall and the specifications applicable thereto show a monolithic wall, and upon that basis plaintiffs made their bid. The cost of constructing such a concrete wall was less expensive than one of frequent construction joints, and this is admitted. Before the work was performed the contracting officer by written order changed the construction of the wall as called for by the contract and required that it be made with construction joints at intervals of 15½ feet which increased the amount of work necessary to be performed and the expense of constructing such a wall over what it would have cost to construct it as originally called for in accordance with the contract. Although plaintiffs did not protest within ten days after the change was ordered, their protest and claim made August 21, 1933, were considered and decided by the contracting officer and the head of the department on the merits. This operated as a waiver of the provision that such protest should be made within ten days, unless the time should be extended by the contracting officer. *Charles Thompson et al.* v. *United States*, *ante*, p. 166. The contracting officer refused to consider and make an equitable adjustment, as required by art. 3 of the contract, but held that the change ordered was justified and authorized by paragraph 43 of the specifications. As hereinbefore pointed out in the first part of this opinion, articles 3, 5, and 15 of the contract and paragraph 43 of the specifications must be considered and construed together. When so considered it is clear that paragraph 43 of the specifications did not confer upon the contracting officer the broad authority, which he claimed, to make changes in units of work which produced and required additional work and costs in excess of the work and costs contemplated, required, and called for by the contract and specifications as made. This was not an increase in or an addition to the *amount* of a unit of work, but was a change in the work as called for. Paragraph 43 contemplated only that when additional information should be obtained subsequent to the making of a contract it might be found desirable to change the location, alignment, dimensions, or design of the dams, power plant, or appurtenant

works, to meet such conditions, and that reasonable changes could be made to this end without the contractor becoming entitled to extra compensation by reason thereof, "except that any increase thereby in the amount of excavation, concrete, or other work required, will be paid for at the unit prices bid in the schedule" (art. 1). But reasonable changes in the location, alignment, dimensions, or design of dams, power plant, or appurtenant works which might result in an increase or decrease of quantity of work as originally specified and called for, and to be performed and paid for in accordance with the specific requirements of the contract and specifications at the unit prices therein specified, are quite different from changes in the work as called for by the drawings and specifications of the contract which cause extra work and increased expense in performing the unit of work called for and specifically shown on the drawings and described in detail in the specifications at the same unit price bid and agreed upon for the work prior to such change. A reading of paragraph 43 shows that this was the scope and purpose of its intent. It provides as follows:

> *Right to change locations and plans.*—When additional information relative to foundation or other conditions becomes available as a result of the excavation work, further test drilling or otherwise, it may be found desirable to change the location, alignment, dimensions, or design of dams, power plant, or appurtenant works, to meet such conditions. The Government reserves the right to make such reasonable changes as, in the opinion of the contracting officer, may be considered necessary or desirable, and the contractor shall be entitled to no extra compensation because of such changes, except that any increase thereby in the amount of excavation, concrete, or other work required, will be paid for at the unit prices bid in the schedule. The contractor's plant shall be laid out and his operations shall be conducted so as to accommodate any reasonable change in the location and design of the various works or any part thereof without additional cost to the Government.

When the above specification is interpreted in the light of art. 3 of the contract, which provided that the contracting officer might make changes in the drawings or specifications

of the contract, but that if such changes caused an increase or decrease in the amount due under the contract or in the time required for its performance an equitable adjustment in the amount to be paid to the contractor by reason of such changes should be made and the contract should be modified in writing accordingly, it becomes clear that it was the duty of the contracting officer, when the plaintiffs submitted proof that the changes resulted in work and expense in excess of that necessary and required, if the change had not been made, to make an equitable adjustment and make reasonable compensation to plaintiffs by reason of such excess work and costs. The construction of paragraph 43 by the contracting officer and the head of the department, and the authority assumed thereunder, ignored the requirements of articles 3, 5, and 15 of the contract. It was for this reason that many of the claims involved in this suit arose. The contracting officer could not preclude the right of plaintiffs to compensation for extra expense incurred by reason of changes ordered, by failure to perform his duty as required by these provisions of the contract. The amount due under the contract as originally made was the unit price bid and accepted for the units of work as specified. Any change made and ordered by the contracting officer which made that unit of work more expensive than it would otherwise have been, had the contractor been permitted to perform it as originally called for, was an increase "in the amount due under this contract" within the meaning of art. 3 for which the contracting officer was required to make an equitable adjustment. The evidence shows that the increased cost to plaintiffs of performing the work made necessary by the change orders in excess of what it would have cost to perform this unit of work as originally specified was $367.97. Judgment will be entered in favor of plaintiffs for this amount.

Claim 16. *$8,663.25, alleged to be due for the installation of pen stocks, outlet pipes, and butterfly valves.*—The installation of the equipment, which is the subject matter of this claim, was necessary for the operation of the power-house. The contracting officer made a written change in the

contract drawings which also operated to change the specifications with reference to installation of this equipment. This change increased the cost of installation of the pen stocks, outlet pipes, and butterfly valves by $910.83 in excess of what it would have cost plaintiffs to install such equipment as originally called for, and it also changed the material in the equipment to be installed so as to reduce the weight thereof by 387,621 pounds which resulted in the reduction of plaintiffs' compensation under unit-price items 69 and 71 by two cents for each pound, by which the weight of the material in the equipment was reduced. Plaintiffs protested and made claim for the increased cost of installation and for an equitable adjustment under the contract, by reason of reduction in weight of the material in the equipment required to be installed. The written protest and claim were not made by plaintiffs within ten days after the change which resulted in the claim was made, but such protest and claim were considered and decided by the contracting officer and the head of the department on the merits. See *Charles Thompson et al* v. *United States*, *supra*. The contracting officer and the head of the department denied the claim on the basis of their construction of the contract and par. 43 of the specifications which they thought authorized the changes ordered without additional compensation. They did not make any findings of fact as to the increased cost or the amount which would be equitably due by reason of the reduction in weight of material to be installed. The contracting officer also held that the claim was not allowable in any amount because of the provisions of paragraphs 2 and 134 of the specifications. In our opinion the last-mentioned paragraphs of the specifications have no bearing upon the question here involved. Paragraph 2 states that "The quantities noted in the schedule are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative." And paragraph 134 provides that "The weights of metal and other parts, the handling and placing of which is to be paid for on the basis of weight, will be determined by the contracting officer. The weights of these items given in the schedule are advance estimates for the purpose of comparing

bids only, and the actual weights may vary widely therefrom." These paragraphs were intended to prevent any misunderstanding as to the estimated total quantities for the purpose of comparing bids, as indicated by the estimates in the schedule under art. 1 of the contract with reference to each unit of work which would be required to be performed. Plaintiffs' protest and claim were not and are not now based upon the estimated weight of the material involved as stated in the schedule; but, on the other hand, the protest and claim were and are based upon the installation of equipment as called for by the drawings and specifications and of the weight of such equipment as shown on the original contract drawings. The revised drawings would not have been necessary if the contract drawings had not shown and described the material to be installed in accordance with the specifications. The revised drawings, together with the letter with which they were transmitted, were changes by the contracting officer within the meaning of art. 3 of the contract. Paragraphs 2 and 134 of the specifications cannot be construed as modifying the definite provisions of the contract drawings and other specifications. Under the provisions of art. 3 of the contract, plaintiffs were entitled to an equitable adjustment which the contracting officer failed to make. *Six Companies, Inc., a Corporation*, v. *United States*, 85 C. Cls. 687, 693–698.

Upon the evidence of record we have found that, on the basis of an equitable adjustment by reason of the changes, plaintiffs are entitled to recover $8,663.25. Judgment will be entered accordingly.

Claim 17. *$293.07 for installation of drain pipes under the upstream apron from block No. 11, Madden Dam.*—The facts with reference to this claim are set forth thereunder in the findings and they show that plaintiffs are not entitled to recover. The drain pipes were not installed as the result of directions or orders of the contracting officer, but they were installed by plaintiffs for their convenience with the acquiescence of the construction engineer.

Claim 18. *$477.63 for certain excavation which plaintiffs insist constituted stripping of Quarry No. 1.*—The facts with

reference to this claim are set forth thereunder in the findings and show that plaintiffs were paid for stripping Quarry No. 1 in accordance with measurements made and established by the contracting officer. The evidence does not establish that in making the measurements the contracting officer violated the provisions of paragraphs 57, 60, and 70 of the specifications, or that his decision as to the measurements for payment was arbitrary or grossly erroneous. Plaintiffs are therefore not entitled to recover under this claim.

Claim 19. *$6,194.43 for powerhouse concrete alleged to have been paid for as training-wall concrete.*—The contract and specifications provided that concrete in the powerhouse below the generator floor should be paid for at the rate of $10 a cubic yard and that concrete in the powerhouse above the generator floor should be paid for at the rate of $15 a cubic yard, and that in the training wall should be paid for at $3 a cubic yard. The contracting officer classified and paid plaintiffs for all of this combination wall as training-wall concrete at $3 a cubic yard. Plaintiffs protested and made claim for payment for a portion of this combination wall for training and powerhouse concrete under paragraph 119 of the specifications. The claim was denied.

Other walls of the powerhouse, as shown by the contract, were from 2 to 5 feet thick. This combination wall was 8 feet thick, as was the rest of the training wall. The training wall downstream from the combination training and powerhouse wall was first constructed, and the combination wall was constructed at the same time as were the other powerhouse walls.

The original contract drawings (5133–51, 52, and 62) showed the north wall of the powerhouse extending 3 feet into the left training wall, that is, 3 feet of the wall was shown as powerhouse wall, and 5 feet as training wall. Paragraph 119 of the specifications provided that the unit of work item of the schedule "Concrete in spillway training walls" included all concrete in the training walls "except the portion of the powerhouse which sets 3 feet into the left training wall."

It seems clear under this specification that plaintiffs were entitled to be paid for 3 feet of this combination wall as powerhouse concrete. On this basis there is due plaintiffs the additional amount of $2,769.48, which, in our opinion, is the amount which they are entitled to recover.

Plaintiffs contend, however, that under a revised design of the powerhouse the north wall was moved farther north which made this wall extend itself 7¾ feet into the left training wall and that, on this basis, they were entitled to recover $6,194.43. However, this was a change in design and location of the powerhouse which the evidence does not show resulted in any material increase in work or cost. Plaintiffs are, therefore, entitled to recover only the amount due under and in accordance with the provisions of paragraph 119 of the specifications at the unit prices stated in the schedule under art. 1 of the contract.

Claim 20. *$2,514.47 for excavation from borrow pit of material necessary for earth cushion over rock below concrete slabs in highways.*—The solution of this claim depends upon the facts which are set forth in the findings. The contracting officer and head of the department denied plaintiffs' claim for payment at $1.50 a cubic yard under contract item No. 11 in the schedule in art. 1 of the contract for "common excavation for highways" on their construction of paragraph 78 of the specifications entitled "Earth fills for highways." This paragraph provided that the earth fills for both the main and branch highways, where these were not located on dams, should be constructed from required excavation for the highways, where the excavated materials were suitable but "that the contractor will not be required to use such excavated material when it is located on the opposite side of the river from the fill being constructed." The paragraph further provided that if there were not sufficient suitable materials available from required excavation for the highways, additional materials should be secured from other required excavation or from approved borrow pits. This paragraph then provided that "Except as otherwise provided for materials on the opposite side of the river, the contractor shall move all required materials to the highway

fills regardless of the length of haul." Further provisions were contained in this specification not material here, and the specifications concluded with the following provision:

> The cost of constructing the earth fills, including all hauling of materials regardless of length of haul, and doing all work described in this paragraph shall be included in the unit prices per cubic yard bid in the schedule for excavation for highways or for other required excavation: *Provided*, That payment for excavating the materials used in these fills from approved borrow pits, if such materials are required, as determined by the contracting officer, will be made at the unit price per cubic yard bid in the schedule for common excavation for highways, in which case the materials will be measured for payment in excavation in the borrow pits.

As originally prescribed by the contract and specifications, this roadway was to be constructed on the rock surface as excavated, but by change order No. 2, dated January 6, 1932, the contracting officer required plaintiffs to excavate the rock surface to an elevation of 1 foot below subgrade. After the excavation so ordered had been made an earth cushion of 1 foot in thickness was required by the contracting officer to be placed in the manner specified by him on the foundation as so excavated on which was to be laid the concrete slabs. The placing of the earth cushion and the paving on this road were done at the earliest possible date. When the road had been excavated in accordance with the change order and was ready for the earth cushion, required to be placed thereon by the contracting officer, there was no required excavation going on and there was no other required excavated material available on the same side of the river on which this road was located. It was therefore necessary for plaintiffs to obtain, and they did obtain, the material necessary for the making of this earth cushion from borrow pits and areas where Madden Dam required excavated material had been wasted by direction of the defendant, both of which were on the opposite side of the river. The excavation work, which was necessary to be done by plaintiffs in order to obtain suitable material for this earth cushion, was not "required excavation" for other features of the

work but was, within the meaning of the provisions of paragraph 78 of the specifications, "excavation from borrow pits approved by the contracting officer," and such materials were required within the meaning of this specification. Although the contracting officer did not "order" plaintiffs to obtain this material from the borrow pit, he did not determine or instruct the plaintiffs that the material should be obtained elsewhere. In fact there was no other suitable material available from "required excavation," and there were no other borrow pits. In the circumstances and upon the facts disclosed, the contracting officer erroneously interpreted the provisions of paragraph 78. Plaintiffs should have been paid the contract price for excavation of the material necessary to make this earth cushion. They were not so paid and judgment will be entered in their favor for $2,514.47 for 1,676.31 cubic yards so excavated at $1.50 a cubic yard under unit item of work #11 in accordance with paragraph 78, *supra.*

Claim 21. *$3,117.40 for alleged additional rock excavation in blocks 13, 14, and 15 of Madden Dam.*—The facts established by the record with reference to this claim, which have been set forth thereunder in the findings, show that plaintiffs are not entitled to recover. Plaintiffs insist that the rock excavation in these blocks was made to the lines and grades, including hand trimming as established and directed by the contracting officer, and that subsequently the contracting officer required them to do further excavation by hand to remedy certain unforeseen conditions encountered in the nature of the rock, and that, for this reason, they were entitled to recover the amount claimed as the cost of so excavating 1,430 cubic yards. This contention is not established by the evidence, and upon the facts set forth in the findings the plaintiffs were properly paid for this excavation under unit of work item 6 at $3.10 a cubic yard.

Claim 22. *$1,346.92 for certain special features of work ordered and performed.*—The material facts with reference to the five items making up this claim are set forth in the findings. As the work of excavating Madden Dam foundations proceeded, plaintiffs were ordered by the contracting officer from time to time by drawings and written instructions

to make changes or additions not shown on the contract plans or referred to under the specifications. Plaintiffs performed the additional work as described in the findings. They were informed that this extra rock excavation would be paid for as general rock excavation for Madden Dam at $3.10 a cubic yard. They protested and claimed that they should be paid for this work, which was required to be done by hand, as for other similar rock excavation provided for in the contract. The contracting officer and the head of the department concluded that the specifications, as interpreted by them, required this rock excavation to be classified as Madden Dam excavation. No findings of fact were made. It was conceded that the work ordered and performed was more expensive and difficult than the rock excavation from Madden Dam but the contracting officer ruled that the rate of pay for rock excavation was not based upon the difficulties involved but on the location of the rock and therefore held that payment could only be made under the specifications as for rock excavation for Madden Dam at $3.10 a cubic yard. In our opinion this conclusion was erroneous. The intent and purpose of a unit-price contract is to establish various prices for the various kinds or classes of work required to be performed so that there will be a fair relation between the cost of performing the work and the compensation to be paid therefor. The many provisions of the contract and specifications show very clearly that it was the character and cost of the work required to be performed that should be made the basis for determining the amount to be paid therefor rather than the location of the work. While location may properly be considered an element in determining the proper price, the nature, difficulty, and cost of the work required to be performed in a contract like the one in suit are the most important and determining factors.

Upon the facts established by the record the claim made by plaintiffs for $1,346.92 is reasonable and is allowed.

Claim 23. *$44.71 for rock excavation for a cut-off trench below tailrace slope paving.*—This claim concerns the correct interpretation of the contract drawings and specifications, paragraphs 65 and 66, as to the classification for this rock excavation of 6.48 cubic yards. The trench in ques-

tion for which the rock excavation was made by hand was shown on the drawings as a "cut-off trench," and it was so in fact. The contract and specifications fixed a rate of $10 a cubic yard for excavation for a cut-off trench, but the contracting officer and the head of the department on the basis of their interpretation of the drawings and specifications held that this excavation "does not appear to be rock excavation for cut-off trenches" as described in paragraphs 65 and 66 of the specifications. Upon this interpretation they paid for this excavation at $3.10 a cubic yard under contract item 6 as excavation for Madden Dam. The excavation as made was clearly for the purpose of providing a cut-off trench and the excavation was of the same character and it performed in the same way as rock excavation for other cut-off trenches which the contract required should be paid for at $10 a cubic yard. The contracting officer, having ordered this work in a written change order with a revised drawing, thereby necessarily changed the specifications which he erroneously construed when making payment. Article 2 of the contract provided that anything mentioned or shown in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, should be of like effect as if shown or mentioned in both. Any change which the contracting officer made and ordered in the contract drawings by revised drawings, correspondingly, and to the same extent, changed the specifications with reference to the work required to be performed. A drawing and change order which added a cut-off trench required that it be paid for as a cut-off trench. Paragraph 43 of the specifications, so often relied upon by the contracting officer, specifically so provided as to increased quantities.

Plaintiffs are entitled to recover on this claim, and judgment will be entered in their favor for $44.71.

Claim 24. *$14,756.73, balance alleged to be due on account of changes made in the design and the concrete construction of certain portions of the powerhouse.*—The original contract plans and specifications for the powerhouse showed and called for placement in mass form of a great deal of concrete which, by subsequent changes and revised draw-

ings accompanied by change orders from the contracting officer, was required to be placed in other than mass form and, at the same time, required placement in a more expensive manner. Some of the changes in design were (1) A change in the design of the draft tubes; (2) Lowering the floor of the pit for future unit No. 3 from elevation 98 to elevation 93; (3) Lowering the mass forming the turbine floor from elevation 113.50 to elevation 108.75; (4) The addition of a passageway below the turbine floor extending from the pit for future unit No. 3 to the south end of the building, the floor level of this passage being at elevation 92. The original drawings showed small pits to provide access to the draft tube tops instead of the passageway required by the change; (5) Increasing the cross sectional area of the cable tunnel; (6) Adding a depression below the floor at elevation 119.50 of the passageway; (7) Extending the east walls of the various rooms at the generator floor level 4½ feet to the east, and raising the ceiling height over part of the area occupied by these rooms; (8) Enlarging the oil room and extending its north wall toward the spillway section of the dam; and (9) Lowering a portion of the transformer platform area from elevation 144 to 142.50.

Some of the other changes ordered, reducing the placement of mass concrete and requiring the performance of work which was more difficult and expensive than originally called for, were:

(1) The originally prescribed bearing walls to support the generator Units Nos. 1 and 2 were replaced by elaborate columns, beams, and girders requiring expensive form work. (2) The temporary supports for the generator floor for future Unit No. 3 were replaced by the same elaborate concrete column, beam, and girder construction later required for Units Nos. 1 and 2. (3) Steel stairs were replaced by more expensive reinforced-concrete stairs, which required only a small yardage of concrete, but much more expensive to construct and install. (4) An operating balcony was added which consisted of very expensive reinforced-concrete construction. (5) Thin walls for housing the potential transformers, panel boards, etc., were required

by the change order, not contemplated originally. And (6) saddles involving small quantities of concrete were used to support the outlet pipes throughout the powerhouse.

One hundred and forty (140) changes were made by the contracting officer in the construction of the powerhouse, and each change required was shown on the revised drawings prepared and delivered to plaintiffs with a letter ordering the work to be performed as changed, and stating as follows:

> The additional information conveyed to you through these drawings involves no change in contract unit prices, nor extension of time, nor increase in the amount of work to be performed under your contract.

These changes were made and ordered by the contracting officer over a period of several months. The revised drawings and letters making and ordering the changes which caused increased costs to plaintiffs over and above the costs of performing the work involved in such changes as shown upon the original contract drawings and called for by the contract and specifications were delivered to plaintiffs October 17 and December 27, 1933, and March 22 and April 13, 1934. These changes related to the more difficult and expensive work required to be done by the change orders over what such work, as called for by the original drawings and specifications, would have cost. The contracting officer based the statements made in his written change orders, that the changed drawings involved no change in the contract unit prices nor increase in the amount of work to be performed under the contract, upon his interpretation of art. 3 of the contract and paragraph 43 of the specifications. He made no computation or determination for the purpose of arriving at a decision as to whether the actual and necessary cost of performing the work as changed was in excess of what such work, as originally called for by the contract and specifications, would cost. His conclusion was merely that any change in any part of the work called for by the contract, drawings, and specifications, for which there was provided a unit price for the work as originally specified, should be paid for at the same unit prices.

Plaintiffs performed the work strictly in accordance with the requirements of the change orders at an actual increased cost over what the work involved in the change orders would have cost, had plaintiffs performed in accordance with the original contract, drawings, and specifications, of at least $8,000.

The defendant's concrete technician, who was a competent engineer of long experience in work of this kind, testified that the work as changed and performed by plaintiffs was much more expensive than the work originally called for and specified, and that a person making a unit price bid for the work as originally called for would not have taken into consideration the increased costs necessary to perform the work as changed and required.

Plaintiffs did not protest and make claim for equitable adjustment under art. 3 of the contract within ten days after receipt of any of the change orders, or after receipt of the last change order, but on October 29, 1934, plaintiffs made written protest and claim for extra compensation on account of additional cost necessarily incurred in performing the work specified and required by the revised drawings and change orders. The engineer of maintenance acting as contracting officer under proper authority from the head of the department considered the protest and claim on their merits and denied them on the ground "that the changes made were reasonable changes, such as are specifically authorized under art. 3 of the contract and paragraph 43 of the specifications. * * * And since claim was not made in accordance with the terms of the contract [art. 3 of the contract and par. 6 of the specifications], it is felt that your claim for extra compensation must be disapproved." Plaintiffs timely appealed to the head of the department who also considered the protest and claim on the merits and denied them on the ground that plaintiffs had been paid for the work performed as required by the contract and specifications. Plaintiffs claim that paragraph 43 of the specifications, when properly interpreted in the light of art. 3 and other provisions of the contract, did not authorize the changes here made without a determination of the necessary increased costs and the making of an

equitable adjustment in the original unit price applicable to the work before changed. In this they are correct. By reason of the manner in which changes were ordered, the large number thereof, the period of time over which the change orders were made, and the fact that the work, as changed, was not completed until late in 1934, it was difficult for plaintiffs to prepare and make a specific protest and claim. We are of opinion in the circumstances that since the contracting officer and head of the department had the right to extend the time for filing of a protest and claim under any change ordered, by considering and deciding the protest and claim on the merits they effectively waived the late filing thereof. *Charles Thompson et al.* v. *United States*, *supra*, decided May 6, 1940. Moreover it was the clear duty of the contracting officer under art. 3 of the contract to determine as a fact, when he made the changes involved, whether such changes would cause an increase in cost of doing the work as required by the change order over the cost as originally specified and called for and, therefore, whether there was an increase in the amount due under the contract, and, if so, to make an equitable adjustment accordingly. This he failed to do when he made and ordered the changes. Instead he based his advice to plaintiffs in the change orders on his interpretation of art. 3 of the contract and paragraph 43 of the specifications, under which he thought plaintiffs were not entitled to any additional compensation, regardless of the cost.

The contract provided that the concrete work in the powerhouse as originally called for should be paid for at the rate of $10 a cubic yard for all concrete work below the generator floor and $15 a cubic yard for all concrete work above the generator floor. The reason for this difference in price was that the concrete work originally specified and called for by the contract above the generator floor was more difficult and expensive to perform than that below the generator floor. Plaintiffs contend that by reason of the fact that the work called for and required to be performed in accordance with change orders both below and above the generator floor was more expensive than that originally called for, the changed work below the generator floor

should be paid for at the rate of $15 a cubic yard instead of $10 for the reason that such changed work was comparable to the work originally required above the generator floor; and that the changed work required and performed above the generator floor should have been paid for at the rate of $20 a cubic yard for the reason that such work was comparable to concrete work in the counterforted wall. In support of this contention plaintiffs rely upon paragraph 117 of the specifications which provides that "Any required concrete, for the works covered by these specifications, not definitely covered by an item of the schedule shall be included for payment under the item of the schedule which most nearly applies as determined by the contracting officer: * * *." But plaintiffs' contention on this point is not sustained by the record.

Judgment will be entered in favor of plaintiffs on this claim for their actual increased costs of $8,000. See finding 72.

Claim 25. *$285.51 for certain unpaid bills rendered by plaintiffs for work which they allege was outside the requirements of the contract.*—The facts with reference to the five items making up this claim are set forth thereunder in the findings. Upon these findings we are of opinion that plaintiffs are not entitled to recover on the first four items, but that they are entitled to recover the amount of $77.93 under the fifth item of the claim. The amount of this item represents the cost to plaintiffs of replacing certain concrete rendered defective by reason of certain air-pressure tests made by defendant's authorized inspectors before the concrete had sufficiently set to permit such tests to be made. The defendant's concrete technician, a competent and experienced engineer in charge of this work, testified that the concrete required to be replaced was not damaged through any fault of the plaintiffs.

Judgment will therefore be entered in favor of plaintiffs on this claim for $77.93.

Claim 26. *$104.54, cost for chipping concrete surfaces at horizontal construction joints alleged to have been in excess of work required by the specifications.*—This claim presents

the question whether the manner in and the method by which the defendant required plaintiffs to clean the concrete surface at the construction joints before placing additional concrete thereon resulted in costs exceeding those required by paragraph 111 of the specifications. Upon the facts established by the record and set forth in the findings under this claim, we are of opinion that the manner in which the concrete was required to be cleaned was authorized by the specifications and that the work of cleaning these surfaces, for the expense of which plaintiffs claim additional compensation, was not extra work outside the requirements of the contract. Plaintiffs are therefore not entitled to recover.

Claim 27. *$279.22 for a change made under which plaintiffs were required to pay for erection bolts furnished by the manufacturer of drum gates.*—In view of the facts established by the record and set forth in the findings under this claim, we are of opinion that plaintiffs are clearly entitled to recover the amount which the defendant required them to pay for erection bolts necessary for the erection of the drum gates on Madden Dam. A proper interpretation of the provisions of paragraphs 40, 41, and 148 of the specifications discloses that it was the intent and purpose of the contract and specifications that the Government in furnishing the material to be installed would also furnish the erection bolts for such equipment which were necessary to hold the equipment in place until it was permanently fastened or riveted. The drum gates were to be furnished by the Government under paragraph 40 of the specifications, and that paragraph also provided that the defendant would furnish anchor bars, rods, and bolts. Other paragraphs of the specifications also show that "a supply of rivets and erection bolts for field erection will be furnished by the Government as provided in paragraph 40." Erection bolts for the drum gates were furnished by the manufacturers but, when the gates were delivered for assembly and installation, there was not a sufficient number of erection bolts for that purpose and the defendant furnished them, for which it made a charge of $279.22 against plaintiffs. We are of opinion that this charge was clearly erroneous and unauthorized and that refund thereof should be made to plaintiffs.

Judgment will therefore be entered in favor of plaintiffs for $279.22 under this claim.

Claim 28. *$242.89, cost alleged to be due for sawing drum gate hinge castings.*—The facts established by the record and set forth in the findings thereunder show that plaintiffs are not entitled to recover. In substance the facts show that the sawing of the drum gate hinges was necessitated by the manner in which the plaintiffs performed certain welding work on drum gate No. 1, which was the only gate on which it was found necessary to saw off a portion of the hinge casting. By a change in the method of welding on drum gates Nos. 2, 3, and 4, no difficulty was encountered and no sawing of hinge castings was necessary. The contracting officer correctly denied this claim on the facts.

Claim 29. *$310.07 for alleged breach of contract in not permitting plaintiffs to transport certain materials.*—Paragraph 165 of the specifications, entitled "Transporting Government materials from shipping point to powerhouse," provided as follows:

> the Government contemplates doing certain work at the site of the works during the period of the contract for the work under these specifications, and it is possible that work other than that now contemplated will be done by the Government during the contract period. It is expected, however, that the major feature of work by the Government will be the installation of the hydraulic and electrical power generating machinery. The Government will also install power and other machine tools in the machine shop in the powerhouse. The contractor shall unload and haul, or otherwise transport, all materials and equipment for the Government or its agents for installation or use at the site of the work by parties other than the contractor, as directed by the contracting officer, in any amount and regardless of size, shape, or kind of material or equipment, between Madden Siding and the powerhouse, whether delivered to the contractor on trucks or railroad cars at the Madden Siding, and as delivered to the contractor at any location in the power house for hauling to Madden Siding.

This paragraph further provides that the contractor would be charged for any such materials lost or damaged after delivery to him, and prior to the time they should be deliv-

ered in proper condition at the required destination, the same amount that the materials so lost or damaged cost the Government at the point of delivery to the contractor. The paragraph concluded with the statement that payment for unloading, hauling, or otherwise transporting, and caring for the Government materials during the time of transportation would be made at the unit price per hundredweight bid in the schedule for transporting materials of all kinds for the Government or its agents in any amount between Madden Siding and the powerhouse.

Unit work item 94 under art. 1 of the contract provided a unit price of one dollar per cwt. for transporting materials of all kinds for the Government, or its agents, in any amount between Madden Siding and the powerhouse.

We think it is clear that the contract contemplated that plaintiffs would be required and have the right to transport all Government materials necessary to be transported to Madden Dam. The phrase "as directed by the contracting officer" in this paragraph meant that the contractor would transport the Government materials when and in the manner directed by the contracting officer and it did not mean that the Government would have the right to take from plaintiffs the right to haul such materials at contract prices and itself do such hauling or give the work to someone else. In this respect the case differs from the facts and contract provisions in *Bulkley* v. *United States*, 7 C. Cls. 543; 19 Wall. 37. Both parties had agreed that plaintiffs should transport these materials and plaintiffs had provided the necessary transportation facilities and were at all times ready and willing to transport any materials or equipment in any amount, size, shape, or kind, as required by the contract. Plaintiffs did transport certain of the Government materials, but by oversight, or otherwise, defendant's employees hauled 36,088 pounds of material covered by the specifications from the Panama Shops and elsewhere to Madden Dam, which plaintiffs, under the contract, had a right to haul at the unit price agreed upon. The record establishes and we have found as a fact that plaintiffs' actual damage on this account was $310.07, about which there was and is no dispute. The contracting officer and head of the depart-

ment did not pay plaintiffs for the reason they concluded that as this was a claim for damages they were not authorized as administrative officers to adjust and settle it.

Judgment will be entered in favor of plaintiffs for $310.07.

Claim 30. *$215.24 balance due for installing mooring outrigger on trash-rack structure.*—This metal mooring outrigger was made and installed by plaintiffs pursuant to written orders of the contracting officer and in accordance with drawing 5137–587 furnished by such officer. The change was ordered February 7, 1934, but plaintiffs did not protest and make claim therefor under unit price item 93, "Installing miscellaneous metal work," until October 19, 1934. This protest and claim were made when the defendant paid plaintiffs for this extra work under unit work item 76, "Installing trash rack metal work" at one cent a pound. Plaintiffs protested this classification and claimed payment therefor under contract item 93, above, at ten cents a pound. The construction engineer, who had no authority to extend the time for filing claims or to waive that provision in the contract, denied the claim on the ground that protest had not been made as required by paragraph 6 of the specifications within ten days after the change was ordered. Plaintiffs appealed to the engineer of maintenance who considered and decided the protest and claim on the merits and held that this was not such extra work as required an extra work order under art. 5 of the contract but that it was authorized within the meaning of paragraph 43 of the specifications. He further held that the mooring outrigger was properly a part of the trash-rack structure called for by the contract as modified by the change order, and that the installation of same was properly classified for payment at the unit price specified in item 76 for installing trash rack metal work at one cent a pound. On appeal to the head of the department, the decision of the contracting officer was affirmed. The contracting officer and the head of the department based their decision on their construction of the specifications. By considering and deciding the case on the merits they waived the provision with reference to the filing of protest and claim within ten days from the date the work was ordered. We think they incorrectly interpreted the

provisions of the pertinent specifications. Paragraph 43 of such specifications has no application to the claim involved. In the division of the specifications entitled "METAL WORK," paragraph 133, entitled "Installing metal work, general," after referring to numerous articles of equipment and metal work to be furnished by the Government under paragraph 40, provided that "the contractor shall attach to or build into the dam, power plant, and appurtenant works all such metal work, and shall install all such gates, valves, hoists, and machinery in a workmanlike manner, as shown on the drawings or as directed by the contracting officer." This provision had reference to the designated metal work and equipment therein immediately above mentioned. This paragraph further provided that "Except as otherwise provided in these specifications, payment for installing and painting all metal work and machinery will be made at the unit prices bid in the schedule for installing the various items of metal work, * * *. The cost of * * * installing, and painting miscellaneous items of metal work, not directly appurtenant to gates, valves, or other features specifically provided for, such as brackets, anchor bolts, and any other metal work to be permanently installed as parts of the completed work, will be paid for at the unit price bid in the schedule for 'Installing miscellaneous metal work.'" Other paragraphs of the specifications which followed related directly to specific items of metal work, painting, etc. Paragraph 149 of the specifications entitled "Trash rack metal work" provided that trash-rack bars, castings, structural steel supports and guides, anchor plates and bars for all trash racks, and guides for the rake for the pen stock trash-rack structure would be furnished by the Government under provisions of paragraph 40. This paragraph then proceeded to direct how these trash racks should be constructed and installed and stated that "Payment for installing and painting all trash rack metal work, except as otherwise provided in paragraph 146 for trash racks over the inlets to the drum gate chambers, will be made at the unit price per pound bid in the schedule for installing trash rack metal work."

The next division of the specifications entitled "WINDOWS, DOORS, AND OTHER MISCELLANEOUS ITEMS" has various numbered paragraphs of the specifications dealing specifically with various items under that heading, and paragraph 164, entitled "Miscellaneous metal work," provides as follows:

> Installing and painting hatchways, manholes, oil tanks, metal ladders, ladder rungs in concrete, gratings, stair nosings, anchor bars, rods and bolts set in concrete for installation of permanent equipment, drain boxes and gratings, brackets, and other miscellaneous metal work not specifically included in other items of the schedule, for which installation and payment has not been specifically provided for elsewhere in these specifications and which are to be furnished by the Government and become a part of the completed work, will be paid for at the unit price per pound bid in the schedule for "Installing miscellaneous metal work," which unit price shall include the cost of unloading, storing, hauling, handling, painting where required, and the complete installation of this metal work, as shown on the drawings or as directed by the contracting officer.

The mooring outrigger was not shown on the original drawings or mentioned in any of the specifications, but in view of the specific provisions of the specifications above mentioned and quoted, we think it is clear that the mooring outrigger, which was a metal ladder-like structure, was not a part of the "trash rack metal work" within the meaning of paragraph 149 but was "miscellaneous metal work" described and intended by paragraph 164, *supra.* Payment for installation thereof should therefore have been made under the written order by the contracting officer therefor at the contract price of ten cents a pound for installing miscellaneous metal work. The contracting officer did not fix the price or the classification in his order of February 7, 1934. Judgment will therefore be entered in favor of plaintiffs for $215.24.

Claim 31. *$171.82 under a change order requiring the construction of a concrete stairway and handrail leading to Adit entrance in block No. 1, Madden Dam.*—Under the original contract drawings there was shown, as a part of the system, galleries or passages in the mass concrete of the main dam immediately adjacent to the right abutment and near the

top of the dam as an exit in block No. 1 to be accessible from the sidewalk on top of the dam through supplementary structures; namely, a cantilever concrete landing and an inclined concrete runway or ramp with pipe handrail. This structure was simple of construction; however, the contracting officer changed the drawings and issued a change order substituting for this ramp and pipe handrail a concrete landing with a concrete stairway protected by concrete handrails or balustrade, and the work was performed in accordance with this ordered change. The making of this structure and the performance of this work as changed were more difficult and expensive than originally called for, but the defendant, when the time came for payment, classified this work and paid for the same under unit work item 48, "Madden Dam concrete," at $2.50 a cubic yard. The concrete work necessary to be performed in constructing this concrete stairway and balustrade was concrete outside the limits of the main dam structure and was of a kind entirely different from the mass concrete in the body of the dam. This concrete work was of a class and was required to be performed in a manner similar and corresponding to the work called for under unit of work item 51 in the schedule under art. 1 of the contract for "Concrete in spillway bridge, and in parapets on abutment section of Madden Dam," at $10 a cubic yard, and should have been so classified and paid for under paragraph 117 of the specifications. This paragraph provided, among other things, that "Any required concrete, for the works covered by these specifications, not definitely covered by an item of the schedule, shall be included for payment under the item of the schedule which most nearly applies as determined by the contracting officer." The contracting officer and the head of the department denied the claim on their construction of paragraphs 43 and 118 of the specifications and paid for this work, as changed, as Madden Dam concrete. This construction of the specifications was erroneous. Under the change as made and ordered the defendant obtained a better and more expensive structure than that originally specified and called for in the contract. The concrete work required and performed under the change order in the Adit entrance

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was not covered specifically by any item of the unit price schedule, but it compared very closely with the work covered by unit price item 51 and we think plaintiffs are entitled to recover on that basis.

Judgment will be entered in favor of plaintiffs for $171.82.

Claims 32 and 33. *$2,427.20, damages assessed and collected from plaintiffs for grout pipes reported obstructed; and for $98.40, deductions made from payment for drilling grout holes 3-K and 3-N.*—The facts established by the record and set forth in the findings under these claims show that plaintiffs are entitled to recover thereon. Claim 33 is similar to Claim 11.

Plaintiffs protested and made claim for refund of damages assessed and collected and for the deductions made, but the contracting officer and the head of the department held on the basis of their construction of paragraph 89 of the specifications that the claims were not allowable. In this we think they erred. Paragraph 89 of the specifications, entitled "Drilling grout holes," is set forth in finding 42.

Paragraph 90 of the specifications was a general provision relating to pressure grouting, and paragraph 91 related to pressure grouting foundations of Madden Dam; paragraph 93 related to pressure grouting contraction joints of Madden Dam. Paragraph 139 of the specifications entitled "Pipe for grouting contraction joints in Madden Dam" contained directions as to the systems of pipes and fittings to be placed for grouting purposes, and stated that "great care shall also be taken to insure that all parts of the system [of pipes installed for grouting purposes] are maintained free from dirt or any foreign substance whatever", and that:

> After each grouting system is placed and the concrete around it completed and at such other times as the contracting officer may direct, the pipe shall be tested by forcing a current of air under pressure through it to the satisfaction of the contracting officer, after which it shall be immediately temporarily capped or otherwise closed to avoid the possibility of any foreign substance entering it until it is pressure grouted. Any pipe that is found to be or becomes clogged due to any cause during the construction of the dam and before it is

> pressure grouted, shall, if practicable, be cleaned or opened up to the satisfaction of the contracting officer. For any pipe which the contractor fails to open up or to replace to meet this test the contractor shall pay to the Government as fixed, agreed, and liquidated damages the sum of two dollars ($2) per linear foot of the total length of that pipe which is thereby made ineffective as determined by the contracting officer.

In view of the facts established by the record and set forth in the findings, we are of opinion that the contracting officer erroneously interpreted the provisions of paragraphs 89 and 139 of the specifications.

As pointed out in the first part of this opinion, the contracting officer was not justified in construing the specifications broadly in favor of the Government; since they were prepared and written by the defendant, they must in case of doubt, be construed more favorably in favor of the contractor. It seems clear to us from a reading of the specifications that the clogging of or obstruction in the grout pipes or holes as a result of which a charge might be made against the contractor, meant, and it was intended to mean, obstruction of such pipes or holes by reason of failure of the contractor suitably to cap or otherwise close the holes or open ends of the pipes. This the plaintiffs did and there is no claim to the contrary. We think it is clear that plaintiffs cannot be penalized when they performed the work involved in these claims strictly in accordance with the specifications. In *Moore, Receiver*, v. *United States*, 46 C. Cls. 139, 172, 173, it was held:

> It is true that the contractors by these provisions of the contract agreed to construct the dry dock "under the inspection and supervision" of the Government engineer, and "subject to his approval"; but we do not think that they thereby agreed to suffer any and all losses which might occur to them by reason of his mistakes in directing the manner in which the work should be done.

Since the specifications provided what plaintiffs should do in order to prevent the pipes and grout holes from becoming obstructed or clogged it seems that, if it had been intended that plaintiffs should be held responsible for or charged with any

obstruction directly resulting from a cause other than failure to protect the pipes or holes as specified, some specific provision would have been made to that end and the failure of the specifications so to provide relieves plaintiffs of any responsibility other than as a result of their negligence, which did not exist and which is not claimed. There is nothing to indicate that the specifications contemplated or intended that plaintiffs should be penalized should the grout holes or pipes become completely filled with grout from grouting operations carried on through other pipes and holes. An assumption, which we think is more reasonable than that made by the contracting officer, would be that the specifications as written probably contemplated that if such grout holes or pipes should become completely filled with grout from other grouting operations, this would be the same as if such holes had been directly grouted.

Moreover, with reference to Claim 33, it appears that a water test was made by defendant instead of an air test as required by paragraph 139 of the specifications. See *Sobel* v. *United States*, 88 Ct. Cls. 149, 167.

Plaintiffs are entitled to recover and judgment will be entered in their favor on these claims for $2,525.60.

Claim 34. *$51.40 for improper classification of and payment for cable rack hooks and conduit channel supports.*— This claim involves the correct interpretation of the provisions of paragraph 156 of the specifications quoted thereunder in the findings. The contracting officer and the head of the department interpreted this specification as requiring that, for the purposes of payment, these metal hooks and supports be treated as a part of the conduits. Plaintiffs protested and appealed, claiming that these hooks and supports which were a part of the conduit racks should be paid for under unit price item 93 for "Installing miscellaneous metal work" at ten cents a pound under the provision of paragraph 156 which provided that "Payment for installing metal inserts, anchor bolts, and bolts for mounting conduit pipe straps and conduit racks, and for installing conduit racks will be made at the unit price per pound bid in the schedule for installing miscellaneous metal work."

We are of opinion that plaintiffs are correct in this interpretation and judgment will be entered in their favor for $51.40.

Claim 35. *$12,825.03 for deductions made at time of final payment on final estimate for (a) rock excavation, item 6; (b) common excavation, item 5; and (c) common excavation of cut-offs with side slopes for Left Ridge Dam and Saddle Dams, item 8.*—Under the facts disclosed by the record and set forth in the findings, the plaintiffs are not entitled to recover on this claim. They did not protest and make claim to the contracting officer or the head of the department on these items. The reason they did not do so was that the work had been completed, and these matters arose at the time when final payment under the contract was being made when everyone was anxious to finish all the matters relating to this large project which had been going on for a little more than three years. Plaintiffs did, however, reserve these claims in the total amount of $11,928.18 in the final release which they executed. The evidence of record does not establish that the net reduction made on recalculation, when the final estimate was prepared for the purpose of final payment, was erroneous. Plaintiffs contend that under paragraph 58 of the specifications, as quoted in the findings under this claim, the monthly estimates and progress payments were correct, final, and conclusive. But we cannot sustain this contention.

Claim 36. *$623.78 for charges made by the defendant for cement used in filling over excavation.*—Upon the facts established by the record and set forth in the findings, under this claim we are of opinion that plaintiffs are not entitled to recover and that the contracting officer correctly denied plaintiffs' protest and claim under the provisions of paragraph 116 of the specifications.

Judgment will be entered in favor of plaintiffs for the total sum of $303,566.63. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

CASES DECIDED

IN

THE COURT OF CLAIMS

April 1, 1940, to October 6, 1940

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 43923. June 3, 1940

Arthur Pelzer.

Income tax; exclusion of gifts made to trust funds for the benefit of individual donees.

In accordance with its opinion of March 4, 1940 (90 C. Cls. 614), and upon a stipulation of the parties filed April 22, 1940, in which certain sums were mentioned as due plaintiff based on the special findings and opinion of the Court, the Court on June 3, 1940, rendered judgment for the plaintiff in the sum of $10,727.01; $317.43, a part thereof, to bear interest at the rate of six percent per annum from November 27, 1935; $6,265.83, a part thereof, to bear interest at six percent from March 17, 1936; and the balance thereof, $4,143.75, to bear interest at six percent from March 24, 1936.

June 3, 1940

No. E–622. *First National Steamship Company.*
No. E–623. *Second National Steamship Company.*
No. E–624. *Third National Steamship Company.*

Purchase of Government ships. Dismissed November 4, 1935, without opinion, 81 C. Cls. 972.

These cases came before the Court on motion on behalf of the several plaintiffs "for reinstatement or for a new trial," and on June 3, 1940, it was ordered that the said motion be overruled.

No. 43130. October 7, 1940

Midpoint Realty Company.

On plaintiff's motion for a new trial the Court on October 7, 1940, ordered that said motion be allowed and that the special findings of fact and opinion of the Court filed on January 8, 1940, as amended by the opinion filed April 1, 1940, and the judgment dismissing the petition entered April 1, 1940 (90 C. Cls. 335, 345), be vacated and withdrawn.

The Court further ordered that the case be remanded to the General Docket and that unless the parties are able to stipulate as to certain facts, set out in the order, the case be referred to a commissioner for the taking of testimony as to said facts.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, pursuant to the stipulation filed in the case of *Rose City Cotton Oil Mill* v. *United States*, Congressional No. 17341 (and all other pending cotton linter cases as per list attached to said stipulation), and the agreement of the parties, judgments against the Government were rendered as indicated:

JUNE 3, 1940

No. 44692, North Mississippi Oil Mills, receiver of	$2,008.82
No. 17559, Congressional. Houston County Oil Mill and Mfg. Co	1,726.04
No. 17609, Congressional. Taft Oil & Gin Co., etc	1,163.06

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON APRIL 1, 1940

H-514. Spicer Manufacturing Co.
43400. Garret W. McEnerney.
43542. Harry L. Crosby, Jr.
43594. Bruce's Juices, Inc.
43596. Florida Fruit Canners, Inc.
43598. The Hills Brothers Co.
43599. Dr. P. Phillips Company.
43601. Florida Grapefruit Canning Co.
43827. H. A. Shaver, Inc.
43835. Walter B. Neuberg, et al.
43983. Strohmeyer & Arpe Company.
44131. T. Howard Duckett, Admr.
44572. Walter O. Birk Candy Company.
44670. Harold T. White, et al.
44671. Annie Jean Van Sinderen.
44672. Harold T. White, et al.
44673. Elizabeth W. Frothingham.
44674. Harriet H. White.
44874. Chrysler Corporation.
44881. Nash-Kelvinator Sales Corp.
44882. Nash-Kelvinator Corporation.
44883. Refrigeration Discount Corp.
44884. Seaman Body Corporation.
44887. Atlantic Refining Co. of Brazil.
44940. W. P. Brown & Sons Lumber Co.
44942. Oklahoma Gas & Electric Co.
44944. Equitable Gas Company.
44945. Duquesne Light Company.
44953. The Minneapolis General Elec. Co.
44954. Kentucky Pipe Line Company.
44955. Kentucky West Virginia Gas Co.
44962. Louisville Gas & Elec. Co.
44988. Northern States Power Co. (Minn.).
44993. San Diego Consolidated Gas & Electric Co.

ON MAY 6, 1940

J-277. Coliseum Battery Company.
J-378. Battery Parts Company.
42350. Clark Thread Company, et al.
42351. Clark Thread Company.
42352. J. & P. Coats (R. I.), Inc.
42353. Spool Cotton Company.
42354. John MacGregor Corp.
42505. Bridgeport Hydraulic Co.
43044. Eastern Air Transport.
43563. Charles H. Rosenfeld.
43573. William W. Hurd.
43597. Floridagold Citrus Corp.
43791. Fruit Growers Express Co.
43848. William H. Sprunt.
43850. J. Laurence Sprunt et al., executors.
44073. Gazette Press, Inc.
44100. C. F. Childs & Company.
44198. Gulf Coast Drilling & Production Co.
44600. A. M. Maddock et al., executors.
44609. The Consumers Brewing Company.
44748. Lewis Spencer Morris et al.
44937. The Pennsylvania-Dixie Cement Corp.
44938. The 270 Broadway Corporation.
44939. Chemical Bank & Trust Company.
45005. Portage Silica Company.

ON JUNE 3, 1940

42370. American Machine & Foundry Co.
42371. American Machine & Foundry Co.
42372. American Machine & Foundry Co.
43341. Bingham & Garfield Railway Co.
44616. Alden Rodney Ludlow.
44906. Lehigh Portland Cement Co.

Cases Involving Infringement of Patents

ON MAY 6, 1940

42546. James V. Martin.
42551. James V. Martin.

ON JUNE 3, 1940

E–374. James V. Martin.
E–385. James V. Martin.
E–453. James V. Martin.
42553. James V. Martin.
42563. James V. Martin.
42566. James V. Martin.
42575. James V. Martin.
42873. James V. Martin.
43313. James V. Martin.
43314. James V. Martin.
43479. James V. Martin.
43495. James V. Martin.
43571. James V. Martin.

Cases Involving Indian Claims

ON APRIL 1, 1940

L–87. The Seminole Nation.
L–136. The Creek Nation.

ON MAY 6, 1940

C–531 (2). Sioux Tribe of Indians.
C–531 (4). Sioux Tribe of Indians.
C–531 (10). Sioux Tribe of Indians.

Cases Involving N. I. R. A. Act of June 25, 1938

ON MAY 6, 1940

44344. The Michaels Art Bronze Co.

ON JUNE 3, 1940

44075. Exum M. Haas.
44352. Cold Spring Granite Co.

Cases for Property Taken Under The Flood Control Act of May 15, 1928

ON APRIL 1, 1940

42775. R. J. Hackney Lumber Company.
42778. Guy A. Thompson, Trustee.

ON MAY 6, 1940

42781. W. O. Davis, Receiver

Miscellaneous

ON MAY 6, 1940

45088. Carolyn S. Smith.

ON JUNE 3, 1940

44193. United Fruit Company.

ON JUNE 7, 1940

43209. Jerome A. Utley.

ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

BROWNSTEIN-LOUIS COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44108]

[90 C. Cls. 1; 310 U. S. 632]

Rental of property by Government; breach of contract; commencement of suit within statutory period.

Decided October 2, 1939; defendant's demurrer sustained and petition dismissed; plaintiff's motion for leave to file an amended petition overruled December 6, 1939.

Petition for writ of certiorari *denied* by the Supreme Court May 20, 1940.

HARRIS TRUST AND SAVINGS BANK AND JENNIE L. FAY, EXECUTORS OF THE ESTATE OF ALBERT R. FAY, DECEASED, v. THE UNITED STATES

[No. 43188]

[90 C. Cls. 17; 310 U. S. 632]

Estate tax; trust executed in contemplation of death.

Decided November 6, 1939; petition dismissed; plaintiff's motion for new trial overruled February 5, 1940.

Petition for writ of certiorari *denied* by the Supreme Court May 20, 1940.

THE SEMINOLE NATION v. THE UNITED STATES

[No. L-89]

[90 C. Cls. 151; 310 U. S. 639]

Indian claim; purpose of Government as to former slaves, or freedmen, of Indian tribes; property rights. Decided January 8, 1940; petition dismissed, on the authority of *Seminole Nation* v. *The United States*, 78 C. Cls. 455.

Petition for writ of certiorari *denied* by the Supreme Court, May 27, 1940.

TENNESSEE CONSOLIDATED COAL COMPANY v. THE UNITED STATES

[44084]

[89 C. Cls. 542; 310 U. S. 649]

Income tax; constitutionality of the statutes imposing taxes on capital stock and excess profits.

Demurrer sustained and petition dismissed, following the decision in the case of Allied Agents, Inc., 88 C. Cls. 315; 308 U. S. 561.

Petition for writ of certiorari *denied* by the Supreme Court, June 3, 1940.

BERTHA M. BAILEY AND W. C. BAILEY, JR., EXRS., OF THE ESTATE OF WALTER C. BAILEY, DECEASED, v. THE UNITED STATES

[No. 43505]

[89 C. Cls., 364; 90 C. Cls. 644; 311 U. S. —]

Estate tax; life insurance policy proceeds; effect of transfer of life ownership; payment of premiums by beneficiary after assignment. Decided March 4, 1940, on motion for new trial, petition dismissed, upon the authority of *Helvering et al.* v. *Hallock et al.*, 309 U. S. 106.

Plaintiffs' petition for writ of certiorari *dismissed* as of September 27, 1940, upon stipulation requesting dismissal in view of settlement, pursuant to the 35th Rule of the Supreme Court.

THE UNITED STATES, PETITIONER, v. EMMETT F. DICKERSON

[No. 44263. Decided November 6, 1939]

[89 C. Cls. 520; 310 U. S. 554]

Certiorari to review a judgment of the Court of Claims against the United States for the pay of reenlistment allowance on the ground that the Acts of Congress suspending the operations of Section 9 of the basic pay Act of June 10, 1922, for the fiscal years 1933–37, did not operate as a repeal of that Act and were not intended by Congress to do so; the basic act remained unchanged and without modification as it had always stood.

The judgment of the Court was *reversed* May 27, 1940, and rehearing was *denied* October 14, 1940, the Supreme Court deciding:

1. A proviso appended to an appropriation in § 402 of Public Resolution 122, June 21, 1938, declared "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "reenlistments made during the fiscal year ending June 30, 1939, notwithstanding applicable portions of sections 9 and 10" of the basic military pay act of June 10, 1922. *Held*, in view of its legislative history, that the effect of the proviso was not merely to restrict the funds available for reenlistment allowances, but to suspend the right to them during the fiscal year specified.

2. There should be a considered weighing of every relevant aid to construction, in determining the meaning of an Act of Congress.

Mr. Justice Murphy delivered the opinion of the Court, as follows:

The question is whether respondent, Dickerson, may recover a judgment against the United States upon a cause of action founded upon Section 9 of the Act of June 10, 1922 [c. 212, 42 Stat. 625, 629–630].

Section 9 provides that after the 1st of July 1922 an enlistment allowance shall be paid " to every honorably discharged enlisted man . . . who reenlists within a period of three months from the date of his discharge." Respondent, who was honorably discharged upon the termination of an enlisted period ending on the 21st of July 1938, reenlisted on the following day, the 22nd, for a period of three years, but was not paid an enlistment allowance. He thereupon brought this action in the Court of Claims. It is conceded that Section 9, if not repealed or suspended at the date of his reenlistment, would entitle him to the sum of seventy-five dollars.

The Government opposed the action before the Court of Claims on the ground that Section 402 of Public Resolution No. 122, June 21, 1938 [c. 554, 52 Stat. 809, 818–819], suspended the allowance for reenlistment during the fiscal year ending June 30, 1939. Section 402 contains a proviso, appended to an appropriation for the Rural Electrification Administration, that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "reenlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10" of the Act of June 10, 1922.

The Court of Claims entered judgment for respondent on the ground that Section 402, while it restricted the funds available for payment of the allowance, did not suspend or repeal Section 9. Because of the importance of the issue in the administration of the revenues, we granted certiorari, March 25, 1940.

There can be no doubt that Congress could suspend or repeal the authorization contained in Section 9, and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise. *United States* v. *Mitchell*, 109 U. S. 146, 150; *Mathews* v. *United States*, 123 U. S. 182; *Dunwoody* v. *United States*, 143 U. S. 578; *Belknap* v. *United States*, 150 U. S. 588, 593; *United States* v. *Vulte*, 233 U. S. 509, 515. See *United States* v. *Langston*, 118 U. S. 389. The question remains whether it did so during the fiscal year ending on the 30th of June 1939.

Section 9 remained in full force and effect during the eleven fiscal years ending on the 30th of June 1923 to 1933, after which date it was suspended during the ensuing four fiscal years by a provision inserted in various appropriation acts. Section 18 of the Economy Act of March 3, 1933 [c. 212, 47 Stat. 1489, 1519], provided that "So much of sections 9 and 10 of the Act . . . approved June 10, 1922 . . . as provides for the payment of enlistment allowances to enlisted men for reenlistment within a period of three months from date of discharge is hereby suspended as to reenlistments made during the fiscal year ending June 30, 1934." This provision, which concededly suspended the authorization for the enlistment allowance, was continued in full force and effect for the fiscal years ending on the 30th of June 1935, 1936, and 1937 by its insertion in the Economy Provisions of the Independent Office Appropriation Act for the fiscal year 1935 and in the Treasury-Post Office Appropriation Acts for the fiscal years 1936 and 1937.[1]

The Second Deficiency Appropriation Bill of May 28, 1937 [c. 277, 50 Stat. 213, 232], also contained a provision affecting the enlistment allowance, but the form of words used was changed. That Act as passed by Congress provided that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment of enlistment allowance to enlisted men for reenlistment within a period of three months from date of discharge as to reenlistments made during the fiscal year ending June 30, 1938, notwithstanding the applicable provisions of sections 9 and 10 of the Act" approved June 10, 1922. The identical provision, with the exception of the dates, was appended as a proviso to Section 402 of Public Resolution 122, copied above, and was made applicable during the fiscal year ending on the 30th of June 1939.

The provision inserted in the Second Deficiency Appropriation Bill for 1937 was introduced on the floor of the Senate as an amendment by Senator Byrnes. In response to questions concerning the amendment, the Senator stated (81 Cong. Rec. 4426):

". . . the language of the amendment has been carried ordinarily in the Treasury and Post Office Appropriation Bill, but was not carried in that appropriation bill this year, and is therefore proposed to be included in the bill now before us."

* * * * *

[1] c. 102, 48 Stat. 509, 523; c. 110, 49 Stat. 218, 226–227; c. 725, 49 Stat. 1827, 1837.

"The effect of it is simply to carry the same limitation that has been carried for years in the appropriation bills."

. . . . .

"Its purpose is to continue the appropriation situation that has existed for years, so that no bounty shall be paid for reenlistment in the military and other uniformed services."

The amendment was thereupon adopted in the Senate without recorded opposition, and was sent to conference. The House managers, in reporting the amendment to the House, described it as "Continuing during the fiscal year 1938 the suspension of the reenlistment gratuity for enlisted personnel of the Army, Navy, Marine Corps, and Coast Guard." 81 Cong. Rec. 5084. The course of the debate amply discloses that the House regarded the amendment as continuing during the fiscal year 1938 the same restriction on the enlistment allowance as the provision inserted in earlier appropriation bills.[2] It was then adopted by the House. 81 Cong. Rec. 5091.

The identical provision (except as to the dates), eventually appended to Section 402 of Public Resolution 122, was introduced as an amendment to the Second Deficiency Appropriation Bill for the fiscal year 1938 (H. R. 10851, 75th Cong., 3d Sess.), then pending in the House. 83 Cong. Rec. 8522-8569. A point of order was made against the amendment on the ground that it was legislation in an appropriation bill; Representative Woodrum, who had

[2] Mr. Scott, one of the chief speakers against the amendment, stated (81 Cong. Rec. 5089): "In 1933 an amendment went into the Treasury-Post Office appropriation bill taking away or suspending this reenlistment bonus. . . . The provision was continued by inserting it in the Treasury-Post Office appropriation bill each year from 1933 until this year. It was in the Treasury-Post Office appropriation bill that was brought into the House for consideration this year. I raised a point of order against the provision on the ground it was legislation on an appropriation bill, and that it did not come under the Holman rule. The Chairman of the Committee sustained the point of order.

"The bill went to the Senate and the suspension was not placed in the bill. The second deficiency appropriation bill passed the House and went over to the Senate. This amendment was placed in there. It was clearly subject to a point of order in the Senate, but the point was not made against it.

"It now comes back to the House for a separate vote as an amendment. If we vote for this amendment it means the further suspension of the reenlistment bonus to the enlisted personnel of the Army, Navy, Marine Corps, Coast and Geodetic Survey, and Coast Guard."

Mr. Woodrum, who took charge of explaining the Conference Report to the House, stated (81 Cong. Rec. 5090): "In the first place, I wish to emphasize the fact that the language in the amendment only asks to continue this legislation for the fiscal year 1938. . . . We ask in this amendment that during the next fiscal year this reenlistment bonus be not allowed; and I may say, Mr. Speaker, this is not taking one solitary thing away from any enlisted man in the Army, Navy, or Marine Corps. He is getting exactly the pay that was promised him, and every member of the Army, Navy, and Marine Corps who enlisted during the last 3 years enlisted with the knowledge there was no reenlistment bonus going to be paid to him if he did reenlist.

. . . . .

". . . they know now what they knew when they reenlisted, that the time has not yet come when the Congress can offer a bonus to people working for the Government."

charge of the amendment, admitted that the point of order was good, and the Chair sustained it. 83 Cong. Rec. 8567. The amendment was then offered in the Senate, where the Presiding Officer also sustained a point of order that it was legislation in an appropriation bill.[3] 83 Cong. Rec. 9189.

The provision was thereafter included by the conference committee as a proviso to Section 402 of H. J. Res. 679 (which later became Pub. Res. No. 122). See 83 Cong. Rec. 9512, 9677. It was passed by the Senate without much debate.[4] In the House, the debate disclosed that the amendment had the same purpose and effect as the provision inserted in the various appropriation bills for the preceding years. Representative Woodrum, in presenting the amendment to the House, described it as follows (83 Cong. Rec. 9677):

". . . we are providing a further inhibition for 1 year against payment of the reenlistment allowances in the military and naval services.

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[3] Senator Byrnes, who had offered the amendment on behalf of the Appropriations Committee, then engaged in the following colloquy with Senator Walsh (83 Cong. Rec. 9189–9190):

Mr. BYRNES. . . I will say to the Senator from Massachusetts, in the light of the ruling of the Chair, that before the Congress adjourns I shall certainly make an effort to do something to bring about a change, so that there will not be dissatisfaction among the various services. If the bounties were all restored, millions of dollars would be involved.

Mr. WALSH. Is not the situation that under existing law there is now an authorization of funds to be paid to those who reenlist in the Army, Navy, Marine Corps, and Public Health Service? Is not that the situation?

Mr. BYRNES. There is authority to pay the bounty. It has not been paid for 6 years.

Mr. WALSH. No funds are available.

Mr. BYRNES. No funds are available.

Mr. WALSH. The House Bill did seek to provide funds for reenlistment bounties in the Army. Of course, it would be highly discriminatory to have reenlistment bounties paid to those who reenlist in the Army, and none paid to those who reenlist in the other branches of the military service.

Mr. BYRNES. It would certainly be discriminatory, and cause great dissatisfaction among the Services.

Mr. WALSH. Is the bill now in such shape that no funds are provided for reenlistment bounties for any branch of the military service?

Mr. BYRNES. That is correct.

Mr. WALSH. What the Senator sought to do was to have Congress declare as its policy that it did not intend in the future to pay such reenlistment bounties, so as to prevent possible claims; is not that true?

Mr. BYRNES. Mr. President, the sole position of the Committee is that no funds being provided, we should not leave open the opportunity for numbers of persons to file claims in the Court of Claims in behalf of men who reenlist, with the result that a year from now, or 2 years from now, some men would receive the reenlistment bounty or some part of it, after the attorneys received their fees.

Mr. WALSH. I think I understand.

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[4] The debate in the Senate was as follows (83 Cong. Rec. 9512):

Mr. WALSH. Mr. President, I understand that the bill as it passed the House contained a provision for the use of funds from this appropriation for reenlistments in the Army, and no provisions were made for the use of any of the appropriation for the payment of reenlistments in the Navy, the Marine Corps, or the Coast Guard.

Mr. ADAMS. That is correct.

Mr. WALSH. The purpose of the amendment is to eliminate the provision for payment in case of reenlistments in the Army because it is discriminatory against the other services and civil forces, which formerly received reenlistment pay and allowances.

Mr. ADAMS. That is correct, and it is to open the way for statutory clearing of the whole situation.

253153—40——46

"No reenlistment allowances have been paid for the past 5 fiscal years in any of the services, and in the absence of permanent law stopping it, the inhibition has been shuttled about in economy bills and appropriation bills at one time or another. We have not paid them for 5 years, and the latter part of this amendment now before the House is a Senate amendment which discontinues for another year the payment of the reenlistment allowances."

The opponents of the amendment, while questioning its wisdom, were in general agreement with its sponsors concerning its purpose and effect. 83 Cong. Rec. 9678–9679. The amendment was then adopted by the House. 83 Cong. Rec. 9679.

We are of opinion that Congress intended in Section 402 to suspend the enlistment allowance authorized by Section 9 during the fiscal year ending on the 30th of June 1939. The legislative history, summarized above, discloses that Congress intended the legislation concerning the allowance during the fiscal years 1938 and 1939 as a continuation of the suspension enacted in each of the four preceding years. The adoption in the act of May 28, 1937, of different terminology might in other circumstances indicate an intent to change the object of the legislation. Compare *Brewster* v. *Gage*, 280 U. S. 327, 337; *Crawford* v. *Burke*, 195 U. S. 176, 190; *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, 448. But the drawing of such an inference is a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence where, as here, it exists. Compare *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48.

The respondent contends that the words of Section 402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are words of art or have a settled meaning. See *United States* v. *Perry*, 50 Fed. 743, 748 (C. C. A. 8th).[5] The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found

[5] Compare Luce, *Legislative Problems* (1935), pp. 421 *et seq.*, 432.

by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co.* v. *United States*, *supra*, at 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.[6] These lead to the conclusion that the judgment of the court below must be reversed.

The Chief Justice, Mr. Justice McREYNOLDS, Mr. Justice STONE, and Mr. Justice ROBERTS dissented, being "of the opinion that the judgment should be affirmed on the views expressed by the Court of Claims."

[6] "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . ." United States *v.* Fisher, 2 Cranch 358, 386.

INDEX DIGEST

CIVIL SERVICE EMPLOYEE.

I. Where plaintiff, a civil service employee, was notified that on account of reduction in force he would be discharged on October 14, 1931, at which date his pay ceased, and where the instant suit was commenced by the petition filed January 2, 1940, it is held that plaintiff's action is barred by the statute of limitations. *Middleman*, 306.

CONTRACTS—Continued.

VI. Where a provision of the contract provides for an apportionment of liquidated damages when part of the buildings are completed within the time specified and part are not so completed, it is held that such provision has application only where a specified time for completion of the buildings remains a valid part of the contract; such provision cannot apply unless it is first found and held that the defendant is entitled to liquidated damages. *Id.*

VII. Failure on the part of the defendant to make available to the contractor the site on which work is to be performed is a breach of the contract. *McCloskey* v. *United States*, 66 C. Cls. 105, cited. *Id.*

VIII. Where the performance of the contract is required at a fixed date there is an implied contract that the Government will do its part so as to render the performance of the contract possible on the part of the contractor. *Worthington Pump & Machinery Corp.* v. *United States*, 66 C. Cls. 230, cited. *Id.*

IX. Where a contractor is prevented from executing his contract according to its terms, he is relieved from the obligations of the contract as to time of completion and from paying liquidated damages. *Levering & Garrigues* v. *United States*, 73 C. Cls. 566, 578, cited. *Id.*

X. Penalties are not favored by the courts when it does not appear that any actual damages have been sustained. *Id.*

XI. Where neither the contractor nor the defendant was the sole cause of delays, and where the delays for the greater part were caused by additional work required by the defendant, which the contractor in part performed at an agreed price, it is held that the contractor is not entitled to recover for additional overhead as such. *Id.*

XII. Where contract provided that contractor should without additional charge furnish all facilities, labor, and materials for tests required by the inspectors and that special, full-size, and performance tests should be as described in the specifications, it is held that contractor is entitled to recover for a special and performance test not described in the specifications. *Id.*

XIII. Where contractor was allowed additional pay for extra work on the basis of contractor's actual cost plus 10 percent to cover overhead and profit and where the extra work was actually performed by a subcontractor,

CONTRACTS—Continued.

it is held that under the contract the ruling of the contracting officer that the amount allowed (10 per-cent) for both profit and overhead was sufficient was conclusive. *Id.*

XIV. Under the contract the contracting officer's decision was final in disputes as to questions of fact but he was given no authority to determine the proper construction of the contract. *Id.*

XV. Where an independent subcontractor threw out rock and soil, which defendant required the prime contractor to remove and do the necessary regrading in accordance with the specifications, it is held that the plaintiff is entitled to recover for extra work. *Id.*

XVI. Where on May 28, 1919, plaintiff entered into a contract with the Chief of Engineers, U. S. Army, whereby certain barges and towboats, then under construction, were leased to the plaintiff for a term of five years, with option to purchase, and on May 26, 1921, a supplemental agreement was entered into between the parties with respect to a runway and unloading facilities, which supplemental agreement was complied with by plaintiff; and where on March 3, 1923, the Secretary of War, without the knowledge or approval of the Chief of Engineers, by letter addressed to plaintiff declared the contract and supplemental agreement cancelled and terminated, under the provisions of the contract; and where on March 25, 1923, the barges and towboats were forcibly seized and taken over by a representative of the United States Government, under instructions, dated March 22, 1923, from the Acting Secretary of War, without the knowledge of the Chief of Engineers, and where during the pendency of a suit in the Federal courts growing out of the matters described a letter addressed to plaintiff dated April 27, 1923, and signed by the Chief of Engineers, was served on plaintiff, notifying plaintiff that the contract and supplemental agreement were cancelled and terminated, such letter having been signed by the Chief of Engineers at the direction of the Secretary of War, and not representing the uninfluenced judgment of the Chief of Engineers, it is held that the plaintiff was illegally and wrongfully deprived of his lease and option to purchase. *Goltra*, 42.

XVII. The plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and he alone could act. *Id.*

XVIII. The Secretary of War had no authority under the contract to exercise the right conferred by the contract upon the Chief of Engineers. *Id.*

CONTRACTS—Continued.

under the contract after the contractor had notified the Government that said contractor was unable to complete the work and said contract had thereupon been terminated by the contracting officer, and where plaintiff did complete the work, it is held that plaintiff is not entitled to have returned to it the amount withheld by the defendant as liquidated damages. *American Employer's Ins. Co.*, 231.

XXVII. Where contract with the Government entered into on June 25, 1932, for the erection of certain buildings in connection with Veterans' Hospital contained a time limit provision which, as extended by the contracting officer, required that certain units should be completed by January 19, 1933, and that the entire contract should be completed by April 19, 1933, and where the first-mentioned units were completed and accepted February 16, 1933, before the contractor stopped work on February 24, 1933, and the contract was terminated on March 7, 1933, it is held that the deduction by defendant of liquidated damages for 28 days' delay from January 20, 1933, to February 16, 1933, in completing said units was in accordance with the provisions of the contract and was warranted. See *Wise* v. *United States*, 249 U. S. 361. *Id.*

XXVIII. Where two or more buildings are to be erected under a contract providing for liquidated damages for delay, the liquidated-damage clause applies to either or both buildings in case of delay. *Id.*

XXIX. The liquidated-damage clause in the instant case disappeared from the contract after the contract was terminated by the Government, not before. *Id.*

XXX. In the instant case the assessment of liquidated damages for the failure to complete the first unit was within the terms of the contract and was due when plaintiff as surety undertook to complete the contract work. *Id.*

XXXI. Where plaintiffs, contractors, made their bid for the construction of a Mississippi River levee on the basis of excavating and placing the necessary material called for to construct said levee, and where a portion of the material was excavated and placed, at the defendant's direction, by another contractor engaged in the excavation of drainage ditches along part of the said levee, it is held that plaintiffs are entitled to recover the amount deducted for the yardage involved. *Johnston Construction*, 274.

CONTRACTS—Continued.

XXXII. Where plaintiffs did not comply with the provisions of the contract requiring contractor within ten days from the beginning of any delay to notify the contractor in writing of the causes of said delay, and stipulating that the findings of the contracting officer, after investigation, should be final, it is held that plaintiffs are not entitled to recover for liquidated damages deducted for such delay. *Id.*

XXXIII. Where a representative of the Government, or of a Government agency, mistakenly and without authority incorrectly advises a bidder that its bid has been accepted by the Government, or by such governmental agency, it is held that the Government is not bound thereby; and such action gives the bidder, or other party, no rights in the premises other than such rights as may be based upon the action actually taken by such agency within the legal authority of such agency to bind the Government. *Ship Construction and Trading Co.*, 419.

XXXIV. Estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority to bind the Government. *Id.*

XXXV. Where a written offer on specific terms and conditions is made and where such terms and conditions therein proposed are accepted without further conditions, and upon the basis of such action nothing further remains to be done except the signing of a formal contract embodying such terms and conditions, there exists a valid contract in the absence of a statute or regulation imposing further requirements. *Id.*

XXXVI. Where parties dealing with each other with the purpose of arriving at a contract intend that their negotiations shall be finally reduced to writing and signed by them as evidence of their agreement upon terms and conditions, there exists no binding contract until the written instrument setting forth such terms and conditions is executed. *Id.*

XXXVII. Where one authorized to do so receives a bid and awards a contract but such action is subject to the approval of another, and that approval is not subsequently given, no binding contract exists on which the United States may be required to respond in damages as for a breach. *Id.*

XXXVIII. Where a contract was made by the United States Shipping Board Fleet Corporation in its corporate capacity, it is held that in such action the Fleet Corporation, an

CONTRACTS—Continued.

operating agency of the United States Shipping Board, was acting on behalf of and as an instrumentality of the United States through the Shipping Board. *Id.*

XXXIX. The fact that a contract entered into by the Fleet Corporation did not state that the Fleet Corporation was representing, or acting as the agent of, the United States does not preclude the assertion of agency in a suit arising out of said contract. *Id.*

XL. Where under the provisions of the Merchant Marine Act of June 5, 1920, a claim by the Fleet Corporation against the plaintiff, arising out of an overpayment, was transferred to the Shipping Board, a governmental agency, and where the cause of action on the overpayment did not accrue until July 28, 1919, said claim was not barred by the statute of limitation on June 5, 1920, when such transfer of said claim was effected. *Id.*

XLI. The right of the United States to sue upon such claim is not barred by the statute of limitation. *Id.*

XLII. Where plaintiff, contractor, entered into a contract with the Government to construct radio towers in the Canal Zone, and where there were delays in completing the work due to failure on the part of the Government to make promptly certain inspections, for which delays the plaintiff was duly compensated, and where there were other delays due to certain changes in the contract for which plaintiff was duly compensated and the time limit was duly extended, and where there were still further delays for which liquidated damages were assessed, upon the facts shown it is held that there was no misrepresentation on the part of the Government as to condition of the site nor any failure to disclose facts known to the Government. *Nelson Construction Co.*, (A) 476.

XLIII. Whatever changes were made, due to subsurface conditions, were carried out in strict conformity with the terms of the contract; a fair and reasonable compensation for the extra work was allowed, and a reasonable extension for the completion of the contract was made. *Id.*

XLIV. There is no showing that there was any duress or coercion brought to bear on the plaintiff to execute the release which plaintiff executed but said release was executed in due compliance with the terms of the contract. *Id.*

XLV. Delays in completing the contract were caused by the plaintiff and the defendant was in no way responsible for any delays for which liquidated damages were assessed. *Id.*

CONTRACTS—Continued.

XLVI. Where plaintiff, contractor, entered into a contract with the Government to erect certain structures at the Naval Radio Station, Canal Zone, it is held that the facts show the Government complied strictly with the terms of the contract and plaintiff was not delayed by any act of the Government for which plaintiff was not allowed an extension of time and an increase in the contract price, and consequently plaintiff is not entitled to recover for the liquidated damages properly assessed under the contract. *Nelson Construction Co.*, (B) 488.

XLVII. Where plaintiff on September 4, 1935, submitted a bid to the Soil Conservation Service of the Department of Agriculture to make certain aerial photographs, and on September 20, 1935, a telegram was sent to plaintiff stating that his offer was accepted and that a formal contract and performance bond would be sent him for execution and return for completion by the Department, but that said telegram was "your authority to proceed with work immediately"; and where plaintiff received from defendant a formal contract which plaintiff signed on October 18, 1935, and returned to the department on October 21, 1935; and where said contract was signed by defendant on November 5, 1935, and returned to plaintiff on November 26, 1935, the plaintiff meantime having proceeded with the work and incurred certain expenses incident to the work prior to the receipt of the signed contract, it is held that the date of November 26, 1935, on which said signed contract was received by plaintiff, was the date of award, from which liquidated damages, if any, were to be assessed in accordance with the provisions of the contract. *Holmberg*, 501.

XLVIII. Where a prior agreement was superseded by a formal and final contract, all prior agreements are merged in the final contract between the parties. *Id.*

XLIX. The rule is well established that in contracts in which it is provided, as in the instant case, that the decision of the contracting officer and the department head shall be final and conclusive only as to questions of fact, a decision or ruling on a protest or appeal which involves or is based upon an interpretation and construction of a contract and the specifications is a decision on a question of law rather than the determination of a fact and does not preclude the consideration, decision, and determination by the court of the question in controversy, including the facts. *Callahan*, 538.

CONTRACTS—Continued.

L. Where contracting officer made and ordered a number of written changes in the original contract drawings, which also operated to change the specifications, and caused obvious increases in the costs of performing the work, and where in denying plaintiffs' protests, claims, and appeals contracting officer gave no consideration to the factual phase concerning increased costs but assumed the right to order changes without regard to increased costs under the provision of paragraph 43 of the specifications, it is held that paragraph 43 of the specifications did not in any way limit or modify the provisions of article 3 of the contract in the instant case, which article required consideration and determination of increased costs resulting from such changes and an equitable adjustment on account thereof. *Id.*

LI. Where contracting officer considered and decided on their merits protests by plaintiffs not made within time limit fixed by contract, it is held that such action on the part of contracting officer constituted a waiver of the time limitation provision. *Id.*

LII. Where the contracting officer and the department head in construing the contract resolved all doubts in favor of the Government and against the plaintiffs, it is held that such manner and method of interpretation and construction were erroneous and unauthorized. *Id.*

LIII. Where an instrument is drafted and prepared entirely by one of the parties thereto and is specific in its detailed requirements, subsequent doubts as to the meaning and applicability of the language and provisions thereof to definite facts, conditions, situations, and circumstances should not be interpreted and construed in favor of the party who drafted and prepared such instrument, but, on the contrary, in such cases, the provisions of such instrument should, in case of doubt, be interpreted more favorably to the other party who did not and could not have anything to say as to the language and provisions of the instrument as prepared. *Id.*

LIV. Where a contract, with its detailed drawings and specifications, was not the result of negotiations between the parties before execution, it is to be presumed that the party who prepared and wrote the contract, drawings, and specifications intended to express clearly his requirements in the language used rather than leaving them to be determined by resolving doubts and inferences in his favor. *Id.*

CONTRACTS—Continued.

LV. Where the contract provided that the plaintiffs, in constructing the "Madden Dam" across the Chagres River, Canal Zone, assumed risks involved in a possible flood in said river, it is held that under a proper construction of said contract the plaintiffs should be held to have assumed only the natural and expected consequences of such flood, and not additional and unusual damages from such flood caused by acts of the Government and its agents. *Id.*

LVI. While no implied contract arises solely from a tort, where the Government by a written contract requires the contractor to assume a risk of loss or damage occasioned by the natural consequences of a specified cause, the Government reciprocally and impliedly assumes an obligation not to interfere in such a way as to increase the hazard of the risk so assumed. *Id.*

LVII. Where contracting officer failed to give instructions promptly, within a reasonable time, as to the use of certain material and the method of construction, and where such failure resulted in delay in the construction of the Left Ridge Dam, it is held that plaintiffs are entitled to recover. *Id.*

LVIII. Where there are two clauses in a contract in any respect conflicting, the clause which is specially directed to a particular matter controls in respect thereto over a clause which is general in its terms, although within its general terms the particular may be included. *Id.*

LIX. Where, by requiring plaintiffs to construct certain fills in the manner and of the materials indicated in certain change orders, the Government obtained better and more expensive dams than the contract contemplated or called for, it is held that plaintiffs are entitled to recover the reasonable and necessary extra expense established by the evidence. *Id.*

LX. Where the contracting officer and the department head agreed that plaintiffs were entitled to pay for extra rock excavation but the department head submitted the matter to the Comptroller General, who ruled that the contractor was not entitled to such extra pay, it is held that the contracting officer and not the Comptroller General had the authority, under the contract, to decide whether the plaintiffs were entitled in the circumstances to this extra pay. *Id.*

LXI. Where it was provided in the contract that the Government would furnish all the cement used in constructing the dam, and where by reason of failure of a shipment of

FEDERAL HOME LOAN BANK BOARD.

I. In enacting sections 18 and 19 of the Federal Home Loan Act, empowering the Federal Home Loan Bank Board to select, employ, and fix the compensation of its officers, employes, and agents without regard to the provisions of other laws applicable to the employment or compensation of officers, employes, attorneys, and agents of the United States, Congress was cognizant of section 5 of the Act of April 6, 1914, prohibiting the employment of any accountants or other experts without statutory authority. *Haskins & Sells*, 35.

II. In enacting a new statute the legislature is presumed to know the existing law. *Id.*

III. In the case of one statute dealing with a subject in a general and comprehensive way and a later statute dealing with part of the same subject in a more definite way the later statute will prevail. *Id.*

FLOOD CONTROL.

I. Where in the construction of a set-back levee on the Mississippi River in 1931, no part of plaintiff's land was used or encroached upon by the Government, and where no part of the old river-front levee bounding plaintiff's

INDIAN CLAIMS.

I. Where the facts disclose that the defendant, acting through its duly authorized representative, the Secretary of the Interior, selected and appointed to make a cruise of timber lands belonging to plaintiffs examiners who were inexperienced and incompetent, and where the examinations and estimates made by such inexperienced and incompetent examiners were not checked and verified by a foreman who was experienced and competent, and where said timber was sold on the basis of such estimates so made, it is held that the acts of the defendant through its authorized officer constituted a violation of the terms and provisions of the Act of January 14, 1889, which act required that the examination of such lands of plaintiffs should be "careful, complete, and thorough" and should be made by "a sufficient number of competent and experienced examiners," and that plaintiffs are accordingly entitled to recover for the loss sustained in the sale of said timber on the basis of said incorrect appraisals thereof. *Chippewa*, 97.

II. Where the timber of plaintiffs was sold on the basis of incorrect estimates made by inexperienced and incompetent examiners, in violation of the act making provision for such examination and appraisal, it is held that plaintiffs are entitled to recover for the amount expended for such inaccurate and incorrect estimates, which amount for such expenses was reimbursed to defendant out of funds belonging to plaintiffs. *Id.*

III. Where it is established that certain officers of the defendant may have acted carelessly and negligently in the selection and appointment of examiners who examined and estimated certain of plaintiffs' timber lands,

INDIAN CLAIMS—Continued.

resulting in loss to plaintiffs in the sale of said timber, it is held that the statute or agreement which grants the right upon which plaintiffs' claim is based determines the question of jurisdiction rather than the conduct of the defendant's authorized agents which constituted the breach. *Id.*

IV. The fact that the actions which constituted the breach of duty, or of the agreement, were aggravated does not affect the right of plaintiffs to maintain and recover on the claim arising out of the statute or agreement. *Id.*

V. Damages are not rendered uncertain because they can not be calculated with exactness and it is sufficient if a reasonable basis of computation is afforded. *Id.*

VI. Where a payment made to plaintiffs was clearly a payment pursuant to an obligation assumed by defendant under the provisions of a treaty, such payment can not be allowed as an offset. *Id.*

VII. Where a payment was made to plaintiffs as compensation which Congress determined to be due plaintiffs for obligations assumed by the United States under previous treaties and where the determination and allowance of the amount of said payment, and the appropriation therefor, were made after the jurisdictional act was enacted, it is held that such amount so allowed and paid by Congress can not be treated as a gratuity, and allowed as an offset under the provisions of the jurisdictional act. *Id.*

VIII. Where it is contended that certain expenditures, made not pursuant to any specific obligation under treaty or agreements, were not solely for the benefit of the Indians but were made pursuant to the established Indian policy of the Government and therefore should not be allowed as offsets for gratuitous expenditures under the provisions of the jurisdictional act, it is held that under the decisions in the *Blackfeet* case and other cases cited any amounts expended from public funds for the benefit of the Indians in maintaining and carrying out the Government's Indian policy, as determined by Congress, without obligation for such expenditures under any treaty or agreement, are gratuities which must be allowed as offsets under the provisions of said jurisdictional act. *Id.*

IX. The question of governmental policy in relation to Indian affairs is a matter for Congress to determine. *Id.*

INDIAN CLAIMS—Continued.

X. Plaintiff, an Indian tribe or nation, brings suit for an accounting with respect to the disposition of its property and the disbursement of its funds under certain treaties, agreements and acts of Congress, and for interest on certain sums involved therein. With the exception of one claim arising from the reduction of the rate of interest on a trust fund established for the benefit of the plaintiff, it is held that such claims so asserted are not warranted and that the expenditures complained of were disbursed for the benefit of the plaintiff, for lawful purposes, under the provisions of the treaties and agreements between the Choctaw Nation and the United States and under various Acts of Congress which were enacted in the exercise of the plenary power of Congress over the property, funds, and affairs of Indian tribes. *Choctaw Nation*, 320.

XI. In purchasing the "Leased District" the Government was concerned with providing for the freedmen, persons of African descent, held in slavery by the Choctaws and Chickasaws; and the "trust fund" provided for in the treaty of 1866 was essentially contingent upon the observance of the treaty provisions for adoption of the freedmen within the time stipulated. Said treaty was not complied with either by the Indians or the United States, as held in *United States* v. *The Choctaw Nation*, 38 C. Cls. 558. *Id.*

XII. When the Government assumes the expense involved in the management, control and disposition of property of an Indian tribe, Congress generally provides for so doing and a liability of this character cannot be inferred where the legislation concerned with the subject matter deals specifically with the details of procedure and makes no mention of such an assumed liability. *Id.*

XIII. When the agreements in question are interpreted in the light of their purpose due to existing conditions, the assumption by the United States of control of the administration of the affairs of the tribe and the carrying out of the agreement did not impose upon the Government the obligation of paying all the expenses incident thereto. *Id.*

XIV. The United States Government has not as a general policy borne the expense of the sale or distribution of tribal property. *Id.*

XV. "Proceeds" means the amount of money produced less the expenses of sale. *Id.*

INDIAN CLAIMS—Continued.

XVI. Congress possesses and has long exercised in many cases the authority to charge Indian tribes with disbursements for their benefit which may be a charge against public funds, for which disbursement the Government has not by treaty or agreement assumed responsibility. *Id.*

XVII. The provision of the Act of August 12, 1935, requiring the court to offset sums gratuitously expended for the benefit of the tribe, is a ratification of the disbursements made by the Secretary of the Interior from tribal funds, for proper purposes and for the benefit of the tribe, which may have been in excess of Congressional appropriations. *Id.*

XVIII. The Atoka and Supplemental agreements did not impose any obligation upon the United States to bear the expense of their administration. *Id.*

XIX. The Act of July 1, 1902, ratifying the Supplemental agreement, contained no provision imposing upon the Government the cost of appraising improvements upon the lands of plaintiff; it was impossible to complete the appraisements without appraising the improvements, and since the statute provided for paying for appraisements out of plaintiff's funds, the Secretary of the Interior had implied authority to pay this expense out of plaintiff's funds. *Id.*

XX. Under the decision in the *Creek Nation* case, 78 C. Cls. 474, 490, where it was held that the Curtis Act, which took away from the Indian authorities the control which they formerly exercised over tribal property and funds, and by implication vested the Secretary of the Interior with authority "to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Indians," it is held that funds expended for pay of miscellaneous employees and for miscellaneous agents' expense, do not come within the purview of annual appropriations from public funds for the operation of the Interior Department and such funds were properly chargeable against the Indian tribe. *Id.*

XXI. Such amounts, even if allowable, would be offset by like amounts under the Act of August 12, 1935. *Id.*

XXII. The amount disbursed from plaintiff's funds for roads was not an expense which the Government was obligated to bear in the administration of the Atoka and Supplemental agreements. *Id.*

INDIAN CLAIMS—Continued.

XXIII. The Secretary of the Interior had implied authority to incur and pay the expenses for investigating tribal warrants and claims, and was given explicit authority by the Act of April 26, 1906. *Id.*

XXIV. The amounts disbursed from tribal funds for pay of Indian police, even if allowable, would constitute an offset under the Act of 1935. *Id.*

XXV. Disbursements for premiums for insurance covering plaintiff's Capitol building, while not specifically authorized by Congress, were made under the implied authority of the Atoka and Supplemental agreements, since said disbursements were solely in the interest of plaintiff and for the purpose of conserving and protecting its property. *Id.*

XXVI. Disbursement from plaintiff's funds for the erection of a monument to a deceased chieftain, authorized by an Act of Congress, was not a taking of plaintiff's funds by the Government for its own benefit or for the benefit of another, and Congress possessed plenary authority to direct the use of Indian funds for any purpose which Congress considered to be for the benefit of the Indians. *Id.*

XXVII. The nature of the purpose of expenditure of Indian funds and the extent of the benefit are matters of policy resting solely with Congress. *Id.*

XXVIII. Congress had authority to provide for payments to newly enrolled members of the plaintiff tribe in order to equalize, so far as possible, the benefits which the members of the tribe would receive from the Indian lands, and also to make payments covering the expense of such disbursements. *Id.*

XXIX. Where authority existed for disbursements for the benfit of the tribe, and where disbursements, even if allowable, would be offset under the Act of 1935, it is held that plaintiff is not entitled to recover for amounts disbursed for (a) medical attention; (b) for investigating coal and asphalt deposits; (c) for expenses of the office of the Supervisor of Mines on plaintiff's lands; (d) for insurance on sanitarium, for hospital employees and for roads and grounds. *Id.*

XXX. Disbursements made in 1911 and 1912 for expenses incident to appraising timber, which was in the interest and for the benefit of plaintiff, and for which the Government had no obligation, but which the Secretary of the Interior had implied authority to make, was also specifically authorized in the Act of March 4, 1911. *Id.*

INDIAN CLAIMS—Continued.

XXXI. The provision of the Atoka agreement with reference to expenses of surveying, platting, and appraising the town lots then located on the reservation, is not applicable to the towns, parts of towns, and town lots provided for in the Act of 1908 when considered in connection with other provisions of the Atoka agreement with reference to town sites and lots, the Act of May 31, 1900, and the Supplemental Atoka agreement approved July 1, 1902. *Id.*

XXXII. Where claim is made for interest, not as interest but as a part of just compensation, which was not paid on a judgment against the defendant in the case of the *United States* v. *The Choctaw Nation et al.*, 38 C. Cls. 558; 45 C. Cls. 618, affirmed 193 U. S. 115, it is held that said claim made in the instant case for an additional amount measured by interest is an integral part of a claim heretofore adjudicated on its merits by the Court of Claims and the Supreme Court and that it is therefore expressly excluded from the jurisdiction of the Court of Claims in the instant case by Section 1 of the Jurisdictional Act under which the instant suit was brought. *Cherokee Nation* v. *United States*, 82 C. Cls. 467, cited. *United States* v. *Creek Nation*, 295 U. S. 103, distinguished. *Id.*

XXXIII. Payments made to the Choctaw National Treasurer subsequent to the passage of the Curtis Act of June 28, 1892, pursuant to and in satisfaction of treaty obligations were not amounts paid or intended for disbursements as contemplated by the Curtis Act and were not in violation of Section 19 of the Curtis Act, but were authorized by Congress in various appropriation Acts, which Acts, even if in conflict with Section 19 of the Curtis Act, were enacted within the plenary power of Congress over the affairs, property, and funds of the Indian tribes for their benefit. *Id.*

XXXIV. Section 19 of the Curtis Act related only to moneys intended for disbursements per capita or for the purpose of carrying out agreements or Acts of Congress concerning matters over which jurisdiction was taken from the tribal government and vested in the Secretary of the Interior when the authority of such tribal government was restricted, and, as so limited,. continued by the Atoka agreement and subsequent Acts of Congress. *Id.*

INDIAN CLAIMS—Continued.

XXXV. Where disbursements were made for the payment of certain Choctaw warrants issued by the Choctaw National Government which, after investigation, were found by the Secretary of the Interior to be valid and binding obligations of the Choctaw Nation, and where the United States had assumed no obligation for such payments, it is held that the Secretary of the Interior had implied authority to make said disbursements from plaintiff's funds and that express authority therefor was conferred by the Acts of March 3, 1899, and April 26, 1906. *Id.*

XXXVI. Where disbursements, properly authorized to be made from tribal funds, were made from certain interest-bearing trust funds, provided and set up by treaties and Acts of Congress, it is held that the Acts of Congress under which said disbursements were made were sufficiently specific to authorize such disbursements from said trust funds. *Id.*

XXXVII. Congress possessed authority to direct the use of Indian tribal trust funds for any purpose which Congress deemed for the best interest of the tribe even if such use might not be in accordance with provisions of a prior treaty, agreement, or Act of Congress. *Id.*

XXXVIII. Where it was provided in the Act of June 22, 1855, that certain sums should be held as a trust fund for the benefit of the Choctaws and that said trust fund should yield an annual interest of not less than five per centum, and where in the appropriation act of March 1, 1907, it was provided that certain sums in said trust fund should thereafter draw interest at three per centum per annum, it is held that the Government by reducing the interest rate specified and agreed to in the treaty of 1855, failed to fulfill its obligation thereunder and thereby received the use of the funds of plaintiff for the benefit of the Government represented by the reduction of interest subsequent to January 1, 1908. *Id.*

XXXIX. The Government cannot use for the benefit of another, or for its own benefit, the funds of an Indian tribe or the amounts due the tribe by the Government under an obligation solemnly assumed; it has been uniformly held that where the Government assumes a treaty obligation to make a definite payment it must do so. *Id.*

PAY AND ALLOWANCES—Continued.

III. The purpose of a special act is to make an exception from the general rule and confer upon the individual referred to therein a special favor exempting him from general statutes and rules. *Id.*

IV. Where the right of compensation exists the failure of Congress to make an appropriation therefor will not of itself deny the right. *Id.*

V. The use of the word "allowance" in the special act instead of "allowances" is immaterial. *Id.*

VI. Where plaintiff, a reserve officer in the United States Army, while returning to his home from active duty was injured in an automobile collision, in which a board of officers held he was not at fault, and where on account of the nature of his injuries emergency treatment by civilian physicians was necessary, in civilian hospital, there being no Army surgeons nor Army hospital immediately available, and where due and timely report was made to the proper officers by plaintiff in accordance with Army regulations, it is held that plaintiff is entitled to recover for the amount necessarily expended by him for such medical service and hospital expenses and for active-duty pay and allowances for the period of his disability. *Rubenstein*, 180.

VII. Where plaintiff, a major in the United States Army, stationed at a permanent Army post where he was assigned to and occupied bachelor quarters, was, on May 31, 1933, ordered to temporary duty with the Civilian Conservation Corps, and performed said temporary duty until August 16, 1934, and where during the period from June 1, 1933, to November 15, 1933, he was assigned as quarters an officer's wall tent without flooring, with open air bath and latrine facilities, and where during said period the quarters assigned to him at his permanent station were not relinquished by him, occupied by other officers or assigned to other officers, it is held that plaintiff is not entitled to recover rental allowances for the period stated. *Donnelly*, 261.

VIII. An officer is not entitled to have quarters assigned to him at his permanent station and also receive rental allowances at his temporary station. *Id.*

IX. Where plaintiff, then a captain in the Quartermaster Corps, United States Army, permanently stationed at Fort Lewis, Washington, where he was assigned to and occupied bachelor quarters, was ordered to temporary duty with the Civilian Conservation Corps, entering upon said temporary duty on May 11, 1933, and being

TAXES.

I. Where plaintiff on June 24, 1933, entered into a contract with the Government to supply certain articles of clothing, and on July 5, 1933, pursuant to a change order agreed to supply additional articles, and did supply such articles in accordance with said contract and change order; and where said contract contained a provision that the price agreed upon therein should be increased, or decreased, in accordance with any taxes, including processing taxes, upon the materials or supplies used in the manufacture of said articles, imposed by Congress after the date set for the opening of the bids, it is held that the processing taxes provided for in the Agricultural Adjustment Act, approved May 12, 1933, but not prescribed and proclaimed by the Secretary of Agriculture, in accordance with the authority conferred by the

TAXES—Continued.

Act, until July 14, 1933, in a proclamation making said processing taxes effective August 1, 1933, were not taxes "heretofore imposed by the Congress," within the meaning and intent of said contract. *Cowden*, 75.

II. The Agricultural Adjustment Act, enacted prior to the date of the contract, did not definitely provide for any tax on the processing of cotton, nor did it specify the amount thereof, if such tax should be imposed, nor when such tax should become effective. *Id.*

III. The action of Congress in imposing the processing tax under the Agricultural Adjustment Act was not complete until action by its delegate, the Secretary of Agriculture. *Id.*

IV. The purpose of the "Federal Taxes provision" of the contract was to reimburse the contractor for its additional costs brought about by the defendant's act in levying additional taxes. *Id.*

V. Where an insufficient claim for refund of capital-stock tax was rejected by the Commissioner of Internal Revenue and suit for recovery was not brought thereon within the limitations of bringing suit after rejection, it is held that this does not prevent the filing of a different claim, which is sufficient, within the period in which such claims may be filed and bringing a suit within the statutory period after rejection of said second claim. The *Altman case*, 69 C. Cls. 721, distinguished. *First National Pictures*, 83.

VI. Where the first claim for refund of capital-stock tax was based on the theory that the taxpayer had transferred its assets and liabilities in return for the surrender of all its capital stock and that taxpayer at the close of the taxable year had no assets or liabilities and was in process of dissolution, and where the second claim was based on the theory that in determining the taxability of plaintiff for the year in question, the taxpayer should be given credit for the value of property distributed to shareholders in liquidation, which value is stated at an amount equaling the declared value of its capital stock with statutory additions, and thereby the "adjusted declared value" is reduced to nothing, it is held that the two claims can not be regarded as one and the same, although they ask for the same amount of refund. *Id.*

VII. The capital-stock tax is applied to the first year on the basis of the declared value of the stock which is fixed by the taxpayer and may or may not be its real value. *Id.*

TAXES—Continued.

VIII. Section 701 (f) of the Revenue Act of 1934 allows a deduction for "the value of property distributed in liquidation to shareholders" but this is the *actual value* of the property so distributed, and it can not be measured in accordance with the "declared value," which "declared value" being purely elective furnishes no method of determining the actual value, and taxpayer is not permitted to fix the "adjusted declared value" in this manner. *Id.*

IX. Where plaintiff, a Wisconsin corporation, which kept its books on an accrual basis, deducted in its Federal income-tax return for 1926 its liability for income taxes for 1926 imposed by the Wisconsin income-tax law of 1925, and where in the year 1927, and before the State income tax was paid, the Wisconsin law was amended, the provision for the levy against 1926 income being repealed, and a tax was levied on two-thirds of plaintiff's income for 1926 and one-third of its income for 1927, payable in 1928, it is held that the action of the Commissioner in including in plaintiff's 1927 income the amount accrued for the 1926 State income tax, which was never paid, was proper. *J. I. Case Co.*, 144.

X. Plaintiff's deduction from its 1926 income of its liability for State income taxes, then existing, was proper, but this liability was extinguished by the Wisconsin 1927 Act and having been extinguished it was properly added to plaintiff's income in the year in which extinguished. *Id.*

XI. Where plaintiff entered into an agreement with a competitor corporation by which said competitor agreed to discontinue the use of certain names and initials on its products and in its advertising, which names and initials were similar to names and initials in use by plaintiff and which similarity had caused confusion and expense, it is held that the sum paid by plaintiff to induce said competitor to surrender its right to the use of said names and initials was a capital expenditure. *Id.*

XII. The benefits incident to the elimination of the use by competitor of certain names and initials, which use was a business but not a legal nuisance, were benefits to be enjoyed not only during the year in which acquired but were of a permanent nature and the sum expended therefor should not be charged against the income of only one year. *Id.*

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TAXES—Continued.

XX. Where taxpayer, after the assessment of certain taxes for the year 1925, was in the year 1929 adjudged a bankrupt; and where in the bankruptcy proceedings the defendant through its collector of internal revenue filed a statement of a claim for said taxes, but no evidence was introduced on behalf of the collector or the defendant and there was no appearance of counsel for either; and where the referee in bankruptcy found that the claim for said taxes was not due and payable and decreed that the claim be disallowed, no appeal from said decree being taken and no further action in the matter being taken by defendant, it is held that the decision of the referee in bankruptcy was final. *Id.*

XXI. The judgment of a referee in bankruptcy upon the merits of a claim presented in behalf of the United States by a party duly authorized to act, from which judgment no appeal was taken, was in effect the judgment of a court and entitled to the same credit and standing. *Id.*

XXII. Where decedent in 1928 and 1929, six and five years, respectively, before his death in 1934, transferred certain property, including securities and cash, to designated trustees, under four trust indentures providing in the one case of two of the trusts that the income therefrom should be paid, first, to decedent's wife during her lifetime, and upon her death, if he should survive her, to decedent during his lifetime, and then if both decedent and wife should predecease their invalid daughter said trust income should be expended for the support and maintenance of said invalid daughter; and in the case of the other two trusts providing that the income therefrom should be paid to the decedent during his lifetime, and then to his wife if he should predecease her, and upon the death of both him and his wife to his other children named, with certain provisions in each of said four trust indentures for the disposition of the corpus of said trusts at certain times and in certain contingencies, it is held that said transfers did not constitute a testamentary disposition of property made in contemplation of death within the meaning of the applicable provisions of the revenue statutes. *Griffith*, 240.

XXIII. "In contemplation of death," within the statute taxing transfers "in contemplation of death," means that thought of death is the impelling cause of transfer, and if the dominant motive is one associated with life rather than with death, the transfer is not taxable. *Id.*

TAXES—*Continued.*

XXIV. Where the record discloses that paramount to all other considerations in decedent's mind was the particular concern which he felt for his invalid daughter, in creating the one trust, and assurance of an adequate income for himself in later years in creating the second trust, it is held that plaintiff is entitled to recover for estate taxes assessed against the transfers in trust as made "in contemplation of death." *Id.*

XXV. Where in 1933 the taxpayer, with the permission of the Commissioner of Internal Revenue, changed its accounting period from a calendar-year basis to a fiscal-year basis ending September 30, and where the first income tax return under the new arrangement covered the nine months' period ending September 30, 1933, it is held that the action of the Commissioner was correct in computing and assessing taxpayer's income and excess-profits tax for the nine months' period on an annual basis, under the provisions of section 216 (b) of the National Industrial Recovery Act which provided that the tax imposed by said section "shall be assessed, collected, and paid in the same manner and shall be subject to the same provisions of law * * * as the taxes imposed by Title I of the Revenue Act of 1932." *Waterman Steamship Corp.*, 249.

XXVI. Where the Revenue Act of 1932 provides that if a separate return is made on account of a change in the accounting period, "the net income, computed on the basis of the period for which separate return is made, shall be placed on an annual basis" and said act sets forth the method by which such calculation shall be made, and where the Commissioner followed said method in computing and assessing the excess profits tax of taxpayer due under the provisions of section 216 of the National Industrial Recovery Act, it is held that said action of the Commissioner was correct. *Id.*

XXVII. The term "taxable year" has different significances, according to its use, and in internal revenue statutes ordinarily means the period for which the taxes are assessed. *Id.*

XXVIII. In the National Industrial Recovery Act it was the intention of Congress that the excess-profits tax should be computed upon the amount of profits which exceeded 12½ percent annually of the adjusted declared value of the capital stock of taxpayer. *Id.*

XXIX. Where taxpayer in 1928 entered into an agreement with a business associate to purchase from said associate at any time, upon reasonable notice, certain bank stock

TAXES—Continued.

XLII. The silver tax, levied upon the use made of the property, is an excise tax; and the application of it made in the instant case was constitutional. *Id.*

XLIII. The silver tax statute makes no reference to calendar or fiscal years, with regard to gains and losses. *Id.*

XLIV. The silver tax statute specifies definitely certain items of expense for which deductions may be made, and "charges in the nature of overhead" are specifically excluded. *Id.*

XLV. "Legal fees," not being included in the deductions specifically set forth by the silver tax statute, are not allowable, whether or not "in the nature of overhead." *Id.*

XLVI. Where plaintiff, a foreign life insurance company, doing business in the United States, during each of the taxable years in question received interest exempt from taxation and also dividends from domestic corporations, and where in computing plaintiff's taxable income for said years from sources within the United States the Commissioner deducted from its gross income from all sources the amount of said interest and dividends and made other deductions allowed by law, and applied to the resulting net income the percentage which plaintiff's reserve funds on business transacted within the United States was of the reserve funds held by it at the end of the taxable year upon all business transacted, it is held that such determination of taxable net income was in accord with the intendment of Congress as expressed in Section 203 of the Revenue Act of 1928. *Manufacturers Life Ins. Co.*, 466.

XLVII. A foreign corporation has no right to do business within the United States except by consent of the United States and upon such terms and conditions as may be imposed. *Id.*

XLVIII. The differentiation in the tax acts between foreign corporations and domestic corporations is a reasonable classification. *Id.*

XLIX. A foreign corporation may be subjected to a different tax from domestic corporations of the same kind. *Id.*

L. The rule for determining the amount of a foreign life insurance company's net income derived from sources within the United States is purely arbitrary, and may or may not be in accord with actual facts, but is not therefore unconstitutional under the Liberty Loan Act of September 24, 1917. *Id.*


